EDITOR'S NOTE

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(8)

No. 85-608-CSY
Status: GRANTED

Docketed:
September 16, 1985

Title: Illinois, Petitioner
v.
Albert Krull, George Lucas and Salvatore Mucerino

Court: Supreme Court of Illinois

Counsel for petitioner: Cherry, Joan S., Rotert, Mark L., Angarola, Michael J.

Counsel for respondent: Garippo, Louis B., Miquelon, Miriam F., Obbish, James M.

Entry	Date	Note	Proceedings and Orders
1	Sep 16 1985	G	Petition for writ of certiorari filed.
2	Nov 13 1985		DISTRIBUTED. November 27, 1985
3	Nov 26 1985	P	Response requested. (Due December 26, 1985 - NONE RECEIVED)
4	Dec 23 1985		Brief of respondents Albert Krull, et al. in opposition filed.
5	Dec 30 1985		REDISTRIBUTED. January 17, 1986
8	Feb 7 1986		REDISTRIBUTED. February 21, 1986.
0	Mar 3 1986		REDISTRIBUTED. March 7, 1986
2	Mar 12 1986		REDISTRIBUTED. March 21, 1986
3	Mar 24 1986		Petition GRANTED.
4	Apr 21 1986		Record filed.
5	Apr 21 1986		Certified copy of original record, 2 volumes, received.
6	May 5 1986		Joint appendix filed.
8	May 5 1986		Order extending time to file brief of petitioner on the merits until June 7, 1986.
9	May 6 1986	G	Motion of Americans for Effective Law Enforcement, Inc., et al. for leave to file a brief as amici curiae filed.
0	May 27 1986		Motion of Americans for Effective Law Enforcement, Inc., et al. for leave to file a brief as amici curiae GRANTED.
1	Jun 2 1986		Order further extending time to file brief of petitioner on the merits until June 21, 1986.
2	Jun 21 1986		Brief amicus curiae of United States filed.
5	Jun 21 1986		Brief of petitioner Illinois filed.
6	Jul 8 1986	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
5	Jul 18 1986		Order extending time to file brief of respondent on the merits until August 20, 1986.
7	Aug 20 1986		Brief of respondent Albert Krull filed.
8	Sep 3 1986		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
9	Sep 12 1986		CIRCULATED.
0	Sep 3 1986		SET FOR ARGUMENT. Wednesday, November 5, 1986. (1st case) (1 hour)
1	Oct 29 1986	G	Motion of petitioner for leave to file reply brief, out-of-time, filed.
2	Nov 3 1986		Motion of petitioner for leave to file reply brief, out-

try	Date	Note	Proceedings and Orders
3	Nov 5 1985		of-time, GRANTED. ARGUED.

85-608 (1)

No.

IN THE
SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1984

STATE OF ILLINOIS,

Petitioner,

vs.

ALBERT KRULL, GEORGE
LUCAS and SALVATORE MUCERINO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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51 pp

QUESTION PRESENTED

Whether a search conducted pursuant to a statutory scheme later held unconstitutional is nevertheless valid where the search was undertaken in good faith reliance on that statute prior to the time that any court had declared the statute unconstitutional.

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TABLE OF AUTHORITIES

No.

IN THE
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STATE OF ILLINOIS,

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LUCAS and SALVATORE MUCERINO,

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Petitioner, the State of Illinois, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Illinois, which was entered on July 17, 1985.

OPINION BELOW

The published opinion of the Supreme Court of Illinois is reproduced in Appendix A to this Petition.

CONSTITUTIONAL PROVISION AT ISSUE

UNITED STATES CONSTITUTION - FOURTH AMENDMENT

The right of the People to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.

JURISDICTION

The opinion, order and judgment of the Supreme Court of Illinois was entered on July 17, 1985. This Petition for a Writ of Certiorari is filed within 60 days of that date. United States Supreme Court Rule 20(1). The jurisdiction of this Court in invoked under 28 U.S.C. §1257(3).

STATEMENT OF THE CASE

Defendant Salvatore Mucerino was charged with one count of possession of a stolen vehicle (R. CM2); defendant George Lucas was charged with three counts of possession of a stolen motor vehicle and one count of possession of a false manufacturer's identification number (R. CL2-CL5); defendant Albert Krull was charged with 6 counts of failure to surrender title (R. CK2-CK6). The facts forming the basis of the instant charges arose on July 5, 1981, when a Detective from the Chicago Police Department made a warrantless entry

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[1]The common law record as to defendant Mucerino is designated as "R. CM;" the common law record as to defendant Lucas is designated as "R. CL." The common law record with respect to defendant Krull is designated as "R. CK." The findings of the trial court upon remand from the Appellate Court are designated as "Supp.R."

onto the business premises of the Action Iron and Metal Company for the purpose of performing a records inspection pursuant to section 5-401(e) of the Illinois Vehicle Code (Ill. Rev. Stat. 1979, ch. 95½, sec. 5-401(e)). On July 6, 1981, one day after the above search and seizure, Federal District Court Judge Milton Shadur, in the unrelated case of Bionic Auto Parts and Sales, Inc. et. al. v. Tyrone C. Fahner, 518 F.Supp. 582 (N.D. Ill. 1981), declared section 5-401(e) unconstitutional because the authority to search had been too broadly granted. Defendants in the instant case subsequently filed a motion to suppress evidence in state court, claiming, inter alia, that the search and seizure carried out by the police on July 5 was invalid due to District Judge Shadur's determination in Federal Court on July 6

that section 5-401(e) was unconstitutional. After a hearing, the trial court granted defendants' motion to suppress, basing its holding solely on District Judge Shadur's finding that section 5-401(e) was unconstitutional. (R. 31)

Detective McNally, on July 5, 1981, at approximately 10:30 a.m., made a warrantless entry onto the premises (i.e. wreck yard) of the Action Iron and Metal Company. (R. 7-8, 24-25) He entered the wreck yard pursuant to his regular inspection duties of checking wreck yards and under authority of Ill. Rev. Stat. 1979, ch. 95½, secs. 5-401 et. seq. (R. 12)

After entering the premises, Detective McNally approached defendant Lucas, identified himself as a police officer, and asked if the yard was open for business. (R. 25) Defendant Lucas replied that he was open for business and that he was the one in charge of buying cars. (R. 21, 25) Detective McNally asked defendant Lucas if he could see the yard's license and the other records of vehicles which had been purchased. (R. 26) Lucas could not produce the license at that time, but did produce a pad of paper which showed the vehicles he had purchased. (R. 26) Detective McNally then asked Lucas if he could look at the cars in the yard and Lucas stated "go right ahead." (R. 26) Detective McNally proceeded to examine the vehicles in the yard and the evidence of stolen motor vehicles he uncovered led to the arrests of the

three defendants. (R. 12, 16-17, 26)

After the State trial court held the statute unconstitutional the People appealed. On November 23, 1983, the Appellate Court of Illinois, First Judicial District, vacated the judgment of the trial court and remanded the cause with the suggestion that the trial court reconsider the constitutionality of section 5-401(e). In so doing the Appellate Court specifically directed that the trial court reconsider this case in light of the evolving considerations of good faith in cases before this Court at that time. During the pendency of the appeal to the Appellate Court, the Illinois legislature revised the content of section 5-401(e) by adding new sections 5-1001-1 and 5-403 (Ill. Rev. Stat. 1983, ch. 95½, secs. 5-1001-1 and 5-403, eff. Jan. 1, 1983). With such revisions in place, the injunctions issued

by District Judge Shadur in Bionic became moot and those parts of Judge Shadur's injunction were therefore vacated by the Court of Appeals in Bionic Auto Parts v. Fahner, 721 F.2d 1072 (7th Cir. 1983).

On July 9, 1984, on remand in the instant case, the state trial judge reiterated his declaration that section 5-401 (e) was unconstitutional as it existed in July 1981. The trial court held that the issue of good faith had no applicability to reliance on an unconstitutional statute and reaffirmed his earlier decision suppressing the evidence. (Supp.R. 9) The People appealed this decision directly to the Illinois Supreme Court. On July 17, 1985 the Illinois Supreme Court affirmed the action of Judge Hogan finding that the statute was indeed unconstitutional and that the Constitution does not afford an

exception to the exclusionary rule based on good faith reliance on a presently valid yet later invalidated statute. It is from this latter finding that the People of the State of Illinois pray for relief.

REASONS FOR GRANTING THE WRIT

I.

SEARCHES UNDERTAKEN IN REASONABLE GOOD FAITH RELIANCE ON A STATUTE SUBSEQUENTLY HELD INVALID ARE CONSTITUTIONAL.

In the recent case of United States v. Leon, 468 U.S. ___, 822 L.Ed.2d 677, 104 S.Ct. 3405 (1984), this Court made it perfectly clear that the critical component in an analysis of the exclusionary rule is deterrence. With deterrence as the goal it is irrational and counterproductive to exclude evidence obtained in reasonable good faith reliance on a presumptively constitutional statute.

Here, the police were performing a search pursuant to a statute which had

never been held unconstitutional by any court. This statute, Ill. Rev. Stat. 1979, ch. 95½, sec. 5-401(e), part of an overall scheme to prevent and detect auto theft, provided that

> "Every record required to be maintained under this Section shall be opened to inspection by the Secretary of State or his authorized representative or any peace officer for inspection at any reasonable time during the night or day. Such inspection may include examination of the premises of the licensee's established place of business for the purpose of determining the accuracy of required records."

Acting under the authority of this statute the officers entered the premises of the body shop, reviewed the scant records kept there and then conducted a search of the premises to verify the records. During the search several stolen vehicles were discovered and arrests were therefore made.

On the following day, in an unrelated action, Federal District Court Judge Milton Shadur declared the statute under which the officers had acted here to be unconstitutional in the case of Bionic Auto Parts and Sales, Inc. et al. v. Tyrone C. Fahner, 518 F.Supp. 582 (N.D. Ill. 1981). Prior to this time no court had ever invalidated this statute.

A squarely analogous situation was before this Court in United States v. Peltier, 422 U.S. 531, 95 S.Ct. 2313 (1975) where this Court allowed the admission of evidence seized in a good-faith border search without a warrant under a statutory construction that was subsequently held unconstitutional. Four months after Peltier's arrest, in an unrelated case this Court had overturned the definition of what constitutes a reasonable distance from the

border for purposes of a border search. Almeida-Sanchez v. United States, 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 506 (1973). In Peltier the Court refused to exclude the challenged evidence and refused to apply the Almeida-Sanchez decision retroactively. The Court stated: "evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." 422 U.S. at 542, 95 S.Ct. at 2320. In so holding the Court explicitly relied on the rationale expressed in Michigan v. Tucker, 417 U.S. 433, 447, 94 S.Ct. 2357, 2365, 41 L.Ed.2d 182 (1974) that in which this Court noted the deterence rationale for the exclusionary rule. Importantly, however, in Tucker this Court stated:

> "Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force."

In Michigan v. DeFillippo, 443 U.S. 31, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979), this Court again noted the deterrent policy underlying the exclusionary rule and also explained the strong policy with respect to the enforcement of presumptively vald laws as follows:

> To deter police from enforcing a presumptively valid statute was never remotely in the contemplation of even the most zealous advocate of the Exclusionary Rule. 443 U.S. at 38 n.3, 99 S.Ct. at 2633 n.3.
>
> * * *
>
> Police are charged to enforce laws until and unless they are declared unconstitutional. The enactment of a law forecloses speculation by enforcement offices concerning its constitutionality with the possible exception of a law so grossly and flagrantly unconstitutional

> that any person of reasonable prudence would be bound to see its flaws. Society would be ill served if its police officers took it upon themselves to determine which laws are and which are not constitutionally entitled to enforcement. 443 U.S. at 37.

In United States v. Leon, 468 U.S. ___, 82 L.Ed.2d 677, 104 S.Ct. 3405 (1984) this Court held that the Fourth Amendment exclusionary role does not bar use of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but which is ultimately found to be unsupported by probable cause. Citing Peltier and other cases in the same line, the court in Leon focused extensively on the deterrence rationale of the exclusionary rule and concluded that "the marginal or nonexistent benefits produced by suppressing

evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion." 82 L.Ed.2d at 698. In so holding the Court focused on the fact that excluding evidence obtained in reasonable, good faith reliance on a statute would only make police less willing to carry out their law enforcement duties. When an officer acts with objective good faith under a warrant issued by a judge or magistrate there is no unlawful police conduct and nothing to deter. "Penalizing the officer for the magistrate's error cannot logically contribute to the deterrence of Fourth Amendment violations." 82 L.Ed. 2d at 697.

Likewise, in the instant case, exclusion of evidence obtained in good faith reliance on a statute could not serve any

rational deterrent purpose. Police officers can not be expected to predict that a facially constitutional statute will later be struck down. Therefore this Court should accept jurisdiction in order to resolve the important question of whether searches undertaken in reasonable good faith reliance on a statute subsequently held invalid are constitutional.

CONCLUSION

For the foregoing reasons, the State of Illinois respectfully requests that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois.

Respectfully submitted,

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STATE OF ILLINOIS
SUPREME COURT CLERK
SUPREME COURT BUILDING
SPRINGFIELD 62706

July 17, 1985

The mandate(s) of this Court will issue to the Appellate Court, Circuit Court or other Agency on August 14, 1985, unless a petition for rehearing (due August 7, 1985) or motion to stay the mandate is timely filed. Supreme Court Rule 368.

Docket No. 60629-Agenda 11-March 1985.

THE PEOPLE OF THE STATE OF ILLINOIS,

Appellant, v.

ALBERT KRULL et al., Appellees.

JUSTICE MORAN deliverd the opinion of the court:

Defendants were charged with various violations of the Illinois Vehicle Code (Ill. Rev. Stat. 1981, ch. 95½, par. 1-100 et seq.) (the Code). The charges stem from a July 1981 search of the Action Iron and Metal Company (Action Iron) which revealed the presence of several motor vehicles that allegedly had been stolen. Albert Krull, the licensee of Action Iron, was charged with six counts of failure to surrender title in violation of section 3-116(c) of the Code (Ill. Rev. Stat. 1981, ch. 95½, par. 3-116(c)). George Lucas, an employee,

was charged with three counts of possession of a stolen motor vehicle and with possession of a false manufacturer's identification number in violation of sections 4-103 (a)(1) and 4-103(a)(1), 4-103(a)(4)). Salvatore Mucerino was charged with possession of a stolen motor vehicle, in violation of section 4-103(a)(1).

Defendants moved to suppress the evidence seized by Chicago police officers during the search of the Action Iron premises. The circuit court of Cook County, after an evidentiary hearing, determined that the search had been conducted without a warrant and without probable cause. In addition the court found that Lucas' purported consent to the search was invalid. The State asserted, however, that the police had authority under section 5-401 of the Code (Ill. Rev. Stat. 1981, ch. 95½,

par. 5-401(e)) to conduct the search. Section 5-401(e) authorizes warrantless administrative searches of the business premises of automotive parts dealers, scrap processors and parts recyclers. The circuit court concluded that section 5-401(e) was unconstitutional, and, finding no other basis upon which to sustain the search, granted defendants' motion. The apellate court, by order, vacated the circuit court's ruling and remanded the cause for further consideration. On remand, the circuit court again found the section at issue to be invalid and, therefore, granted the motion to suppress. The State now appeals directly to this court pursuant to our Rule 603 (87 Ill. 2d R. 603).

The primary issue concerns the constitutionality of the statutory inspection scheme authorized by section 5-401(e) in

1981 when the search took place. The Illinois Vehicle Code has subsequently been amended, and the inspection scheme, as amended, has been upheld by one court as constitutional. (Bionic Auto Parts & Sales, Inc. v. Fahner (7th Cir. 1983), 721 F.2d 1072.) The search here, however, occurred before the relevant amendments. The State contends that the warrantless inspection scheme authorized in 1981 by section 5-401(e) was constitutional. It argues, therefore, that the July 1981 search of Action Iron pursuant to section 5-401(e) was valid. Alternatively, the State asserts that the search was made in "good faith" reliance on the statute, which at the time had not been declared unconstitutional. As such, it argues that the search was valid regardless of whether the statute is subsequently determined to be unconsti-

tutional. In addition, it contends that the evidence seized on July 5, 1981, was the result of a valid consent search.

The record discloses that on July 5, 1981, at approximately 10:30 a.m., Leilan McNally, a Chicago police officer, observed tow trucks bring several vehicles inside the premises at Action Iron. McNally, who was assigned to inspect wrecking yards, entered the premises without a search warrant. Once inside, he met defendant Lucas. McNally identified himself, and asked Lucas if the yard was open for business. Lucas responded that it was, and stated that he was in charge of the premises. The other defendants were not present when McNally entered the yard. Defendant Mucerino arrived at Action Iron at about 11:30 a.m. Defendant Krull was not present while McNally was on the premises. McNally was

later joined by two other police officers. They did not have a search warrant. None of the officers had procured arrest warrants.

According to McNally, he asked Lucas for the dealer's license and for the records of vehicle purchases. Lucas replied that he did not know where the license was located. Lucas did, however, produce a sheet of paper, which he stated was a list of all of the vehicles he had purchased. Five purchases were listed on the sheet of paper. McNally then asked Lucas if he could look at the cars in the yard. McNally testified that Lucas said, "Go right ahead."

Thereafter, McNally inspected the vehicles in the yard and made notations of the vehicles by serial number. He checked the serial numbers on a mobile computer in

his squad car. Based on the computer check, he determined that the remnants of three vehicles in the Action Iron yard had been stolen. McNally testified at the suppression hearing that he also found another vehicle with its vehicle identification number removed. He seized all four vehicles. McNally also placed Lucas under arrest. The other defendants were arrested at a later date.

Section 5-301 of the Code (Ill. Rev. Stat. 1981, ch. 95½, par. 5-301) requires dealers in used auto parts to be licensed. Under section 5-401(a) and administrative regulation, licensees must keep various records relating to the acquisition and disposition of vehicles and parts. Section 5-401(e) (Ill. Rev. Stat. 1981, ch. 95½, par. 5-401 (e)), the section being challenged here, provided for the warrantless

inspection of the records required to be kept by licensees and for the inspection of licensees' business premises. It stated:

> "Every record required to be maintained under this Section shall be opened to inspection by the Secretary of State or his authorized representative or any peace officer for inspection at any reasonable time during the night or day. Such inspection may include examination of the premises of the licensee's established place of business for the purpose of determining the accuracy of required records."

This is not the first case to address the constitutionality of the Code's administrative inspection scheme. On July 6, 1981, the day after the search under consideration here occurred, the federal district court, in Bionic Auto Parts & Sales, Inc. v. Fahner (N.D. Ill. 1981), 518 F.Supp. 582, a civil rights action brought

pursuant to 42 U.S.C., section 1983, held that section 5-401(e) was unconstitutional. The district court determined that section 5-401(e) vested excessive discretion in enforcement officers and did not define regular enforcement procedures. As such, the court held that the section failed to meet the standards for administrative searches established in Donovan v. Dewey (1981), 452 U.S. 594, 69 L.Ed.2d 262, 101 S.Ct. 2534, and was invalid under the fourth and fourteenth amendments to the United States Constitution.

Subsequently, the Code was amended by the Illinois General Assembly. These amendments, particularly section 5-403 (Ill. Rev. Stat. 1983, ch. 95½, par. 5-403), placed additional limits on the frequency and duration of the searches authorized by section 5-401(e). On appeal from

the district court decision in Bionic Auto Parts, the Federal appellate court declined to address the constitutionality of the inspection scheme as it existed in 1981. Rather, it considered the present statutory provisions. The court held that the addition of sections 5-403 and 5-100-1 (Ill. Rev. Stat. 1983, ch. 95½, par. 5-100-1) "cured any unconstitutional taint which the Vehicle Code otherwise might have had." (Bionic Auto Parts & Sales, Inc. v. Fahner (7th Cir. 1983), 721 F.2d 1072, 1075.) Because the search here occurred prior to the effective date of sections 5-403 and 5-100-1, our inquiry is necessarily limited to consideration of the constitutionality of the search in terms of the statute as it then existed.

The fourth amendment to the United States Constitution (U.S. Const., amend.

IV) and article I, section 6, of our State Constitution's bill of rights (Ill. Const. 1970, art. I, sec. 6) protect individuals against unreasonable searches and seizures. (People v. Hoskins (1984), 101 Ill. 2d 209, 214.) Administrative inspections are considered searches within the meaning of the fourth amendment. (Donovan v. Dewey (1981), 452 U.S. 594, 69 L.Ed.2d 262, 101 S.Ct. 2534; Camara v. Municipal Court (1967), 387 U.S. 523, 18 L.Ed.2d 930, 87 S.Ct. 1727.) Therefore, the rule that warrantless searches are generally unreasonable, and hence unconstitutional, applies to administrative searches, including the inspection of commercial business by government officials. (See Marshall v. Barlow's, Inc. (1978), 436 U.S. 307, 312, 56 L.Ed.2d 305, 311, 98 S.Ct. 1816, 1820; See v. City of Seattle (1967), 387 U.S.

541, 546, 18 L.Ed.2d 943, 948, 87 S.Ct. 1737, 1741.) However, some legislative schemes authorizing warrantless administrative searches have survived fourth amendment scrutiny. (See, e.g., United States v. Biswell (1972), 406 U.S. 311, 32 L.Ed.2d 87, 92 S.Ct. 1593 (firearms industry); Colonnade Catering Corp. v. United States (1970), 397 U.S. 72, 25 L.Ed.2d 60, 90 S.Ct. 774 (liquor industry).) The Supreme Court has recognized that the assurance of regularity afforded by a warrant may be unnecessary where there has been a long and extensive regulatory presence in a certain industry. The court in Donovan v. Dewey (1981), 452 U.S. 594, 598-99, 69 L.Ed.2d 262, 268-69, 101 S.Ct. 2534, 2538, explained:

> [U]nlike searches of private homes, which generally must be conducted pursuant to a war-

rant in order to be reasonable under the Fouth Amendment legislative schemes authorizing warrantless administrative searches of commercial property do not necessarily violate the Fourth Amendment. [Citations.] The greater latitude to conduct warrantless inspections of commercial property reflects the fact that the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home, and that this privacy interest may, in certain circumstances, be adequately protected by regulatory schemes authorizing warrantless inspections."

The court in Donovan v. Dewey upheld a Federal statute which provided for the warrantless inspection of mines. In so doing, the court established criteria to determine whether a particular statutory

scheme meets the test of reasonableness required by the fourth amendment. Ini tially. the court noted that Congress had a substantial interest in promoting mine safety and that a "system of warrantless inspections was necessary 'if the law is to be properly enforced and inspection made effective.' " (452 U.S. 594, 602-03, 69 L.Ed.2d 262, 271, 101 S.Ct. 2534, 2540.) Moreover, the statute "in terms of certainty and regularity of its application, provide[d] a constitutionally adequate substitute for a warrant." (452 U.S. 594, 603, 69 L.Ed.2d 262, 272, 101 S.Ct. 2534, 2541.) The court observed that the statute required inspection of all mines, defined the frequency of inspection, prohibited forcible entries, and required government officials to pursue civil remedies when refused entry to a mine. In addition,

compliance standards were set forth in the statute and administrative regulations. The court concluded that since the "discretion of Government officials to determine what facilities to search and what violations to search for is thus directly curtailed by the regulatory scheme," the statute did not violate the fourth amendment. 452 U.S. 594, 605, 69 L.Ed.2d 262, 273, 101 S.Ct. 2534, 2541.

There is certainly a strong public interest in preventing the theft of automobiles and the trafficking in stolen automotive parts. Any statutory scheme, like section 5-401(e), which helps facilitate the discovery and prevention of automobile thefts, furthers that strong public policy. (See Northern Illinois Automible Wreckers & Rebuilders Association v. Dixon (1979), 75 Ill. 2d 53, 61.) In

addition, we believe it reasonable to assume that warrantless administrative searches are necessary in order to adequately control the theft of automobiles and automotive parts. However, we disagree with the State that saection 5-401(e), unencumbered by the recent amendments which we have alluded to earlier, provides a constitutionally adequate substitute for a warrant. Like the district court in Bionic Auto Parts & Sales, Inc. v. Fahner (N.D. Ill. 1981), 518 F.Supp. 582, we believe that the section vested State officials with too much discretion to decide who, when, and how long to search. The statute stated that searches could be conducted at "any reasonable time during the night or day." (Ill. Rev. Stat. 1981, ch. 95½, par. 5-401(e).) This language is very similar to the provision found to be

unconstitutional in Marshall v. Barlow's, Inc. (1978), 436 U.S. 307, 309, 56 L.Ed.2d 305, 309, 98 S.Ct. 1816, 1819. Since the statute did not provide for the regularity and neutrality required by the fourth amendment, we must conclude that the warrantless search conducted pursuant to the statute in force at the time (July 5, 1981) was unconstitutional, unless there is another basis upon which to uphold the search.

The State argues that the search here was valid even though the statute authorizing the search was unconstitutional. It asserts that the search and seizure made in "good faith" reliance on section 5-401(e), which at the time had not bee declared to be unconstitutional, were valid regardless of the fact that the statute was subsequently found to be unconstitutional. The

State, in essence, attempts to compare the present case to Michigan v. DeFillippo (1979), 443 U.S. 31, 61 L.Ed.2d 343, 99 S.Ct. 2627, where the Supreme Court upheld an arrest and search made pursuant to an ordinance which was subsequently found to be invalid.

In DeFillippo, a Detroit ordinance made it unlawful for any peson stopped by police to refuse to identify himself and produce evidence of his identity. The defendant was stopped pursuant to the statute. When he gave police a false identity, he was arrested and searched. Drugs were discovered in one of defendant's pockets and he was charged with possession of a controlled substance. The Michigan Court of Appeals declared the ordinance unconstitutional and ordered that the evidence seized during defendant's arrest be

suppressed. The Supreme Court reversed, holding that the arrest based on probable cause and in good faith reliance on the ordinance was valid, despite the subsequent determination that the ordinance was unconstitutional. The court concluded that any search that was conducted incident to the arrest also was valid. 433 U.S. 31, 35-38, 61 L.Ed.2d 343, 348-50, 99 S.Ct. 2627, 2630-32.

In holding the search constitutional, however, the Supreme Court in DeFillippo distinguished between substantive laws, which define criminal offenses, and procedural laws, which directly authorize searches. An arrest and search conducted pursuant to a substantive law, like the Detroit ordinance, will be upheld, provided the officer has probable cause to make the arest and he relied on the statute in good

faith. In contrast, an arrest and search made pursuant to a procedural statute, not yet declared unconstitutional, and which authorizes unlawful searches, will not be upheld, even though the arrest and search were made in good-faith reliance on the statute. (443 U.S. 31, 39, 61 L.Ed.2d 343, 351, 99 S.Ct. 2627, 2633; see, e.g., Torres v. Puerto Rico (1979), 442 U.S. 465, 61 L.Ed.2d 1, 99 S.Ct. 2425 (search of airport luggage pursuant to statute that authorized such searches without a warrant and without probable cause violates fourth amendment); see generally Comment, Constitutional Law: Search and Seizure - The Role of Police Officer Good Faith in Substantive Fourth Amendment Doctrine (1980), 55 Wash. L. Rev. 849, 865-66.) The court continues to utilize the substantive-procedural dichotomy in determining whether a search conducted pur-

suant to a statute was valid. United States v. Leon (1984), 468 U.S. ___, ___, 82 L.Ed.2d 677, 691, 104 S.Ct. 3405, 3415-16; see, e.g., Ybarra v. Illinois (1979), 444 U.S. 85, 62 L.Ed.2d 238, 100 S.Ct. 338.

Section 5-401(e), unlike the Detroit ordinance in DeFillippo, did not define a substantive criminal offense. Rather, it directly authorized warrantless searches. Thus, section 5-401(e) is included in the category of statutes which the Supreme Court has defined as procedural. Any good-faith reliance on such a statute will not cure an otherwise illegal search. See, e.g., Almeida-Sanchez v. United States (1973), 413 U.S. 266, 37 L.Ed.2d 596, 93 S.Ct. 2535; Sibron v. New York (1968), 392 U.S. 40, 20 L.Ed.2d 917, 88 S.Ct. 1889; Berger v. New York (1967), 388 U.S. 41, 18 L.Ed.2d 1040, 87 S.Ct. 1873.

The State also contends that defendant Lucas validly consented to the search of the Action Iron premises. A search conducted with a defendant's valid consent does not violate the fourth amendment. The validity of a consent search depends on whether the consent was voluntarily given. (People v. Bean (1981), 84 Ill. 2d 64, 69.) The rule for determining the voluntariness of a consent to search is that it must be shown that consent was not the result of duress or coercion, express or implied, but was in fact freely given. (Schneckloth v. Bustamonte (1973), 412 U.S. 218, 248, 36 L.Ed.2d 854, 875, 93 S.Ct. 2041, 2059.) Whether consent has been voluntarily given is a question of fact to be determined by the trial court, and that determination will be accepted by the reviewing court unless it is cleary unreasonable. People

v. DeMorrow (1974), 59 Ill. 2d 352, 358.

The search here commenced when Officer McNally entered the Action Iron premises and ordered Lucas to produce the license and records required to be kept under section 5-401(a). He testified that he entered the premises slely on the basis of section 5-401(e), which we have today held to be invalid. He did not have a warrant or probable cause. None of the defendants consented to his entering the premises. Nor does the State contend that Lucas voluntarily consented to inspection of the records. Based on the fact that Lucas purportedly consented midway through the search, and other factors, the trial court concluded that Lucas' consent was involuntary. It determined that Lucas had merely acquiesced to what he thought the officer had a right to do under section

5-401(e). Our review of the record convinces us that the trial court's determination was not unreasonable. The trial court made its decision after considering all the facts surrounding the search. Such a factual determination is entitled to deference by the reviewing court. See People v. DeMorrow (1974), 59 Ill. 2d 352, 358.

For the reasons given, the circuit court's order granting defendants' motion to suppress is affirmed.

Judgment affirmed.

SUPREME COURT OF ILLINOIS

OPINION LIST

Springfield, Illinois, July 17, 1985

Opinions have this day been filed in the following cases:

No. 57935 - Alfred M. Sanelli, appellant, v. Glenview State Bank, appellee. Appeal, Circuit Court (Cook).
Order affirmed.
Simon, J., Clark, C.J., & Ward, J., dissenting.

No. 58586 - People State of Illinois, appellee, v. Domingo Perez, appellant. Appeal, Circuit Court (Will).
Judgment affirmed.
Simon, J., dissenting.

No. 58993 - E&E Hauling, Inc.; et al., etc., et al., appellees, v. Pollution Control Board, appellee (The Village of Hanover Park, etc., appellant). Appeal, Appellate Court, Second District.
Judgment affirmed.
Simon, J., dissenting.

No. 59444 - Kathy Simpson, as Admr., etc., et al., appellees, v. General Motors Corporation, etc., appellant. Appeal, Appellate Court, First District.
Judgment affirmed.
Ryan & Miller, JJ., dissenting.

No. 59766 - Larry Clarkson, appellant, v. William Wright, appellee. Appeal, Appellate Court, Third District.
Judgments reversed; cause remanded.
Ryan, Moran & Miller, JJ., dissenting.

No. 59787 - People State of Illinois, appellant, v. John Gorney, Jr., appellee. Appeal, Appellate Court, Third District.
Judgment reversed; cause remanded with directions.

No. 59912 - People State of Illinois, appellant, v. Charles O. Wick, appellee. Appeal, Appellate Court, Second District.
Judgment affirmed.

No. 60114 - Peter J. Vogel, et al., appellees, v. Jim G. Dawdy, et al. (Norman Suttles, et al., appellants). Appeal, Appellate Court, Fourth District.
Judgments affirmed; cause remanded.
Miller, J., took no part.

No. 60123 - John W. Unger, M.D., appellant, v. Continental Assurance Company, et al., appellees. Appeal, Appellate Court, First District.
Judgment affirmed.
Simon, J., dissenting.

Nos. 60182, 60644 Cons. - Donald John Prewein, et al., appellees, v. Caterpillar Tractor Company, et al., appellants. Appeal, Appellate Court, Third and Second Districts.
No. 60182 - Judgment affirmed.
No. 60644 - Judgment reversed; cause remanded.

No. 60184 - People State of Illinois, appellant, v. Terry B. Allen, appellee. Appeal, Appellate Court, Third District.
Judgment of Appellate Court reversed; Judgment of Circuit Court affirmed; cause remanded.

Nos. 60373, 60374, 60375, 60376 Cons. - James H. Felt, et al., appellees, v. Board of Trustees of the Judges Retirement System, etc., appellant. Appeal, Circuit Court (Sangamon).
No. 60373 - Judgment affirmed.
No. 60374 - Judgment affirmed.
No. 60375 - Judgment affirmed.
No. 60376 - Judgment affirmed in part.
Ryan, J., took no part.

The motion by appellees to strike certain portions of appellant's brief is denied.

No. 60515 - Walter Braun, appellant, v. Retirement Board of the Firemen's Annuity & Benefit Fund of Chicago, etc., et al., appellees. Appeal, Appellate Court, First District.
Judgment affirmed.

No. 60629 - People State of Illinois, appellant, v. Albert Krull, et al., appellees. Appeal, Circuit Court (Cook).
Judgment affirmed.

(2)

No. 85-608

In the Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF ILLINOIS,

Petitioner,

vs.

ALBERT KRULL, GEORGE LUCAS and SALVATORE MUCERINO,

Respondents.

RESPONDENTS' CONSOLIDATED BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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QUESTIONS PRESENTED

A. An Arrest And Search Made Pursuant To A Procedural Statute, Not Yet Declared Unconstitutional And Which Authorizes Unlawful Searches, Will Not Be Upheld Even Though The Arrest And Search Were Made In Good Faith Reliance On The Statute

B. Additional Reasons That Certiorari Should Be Denied:

(1) The decision below gave full consideration to the issues and decided them in conformity with the precedent established by this Court;

(2) The State mischaracterizes the facts and therefore, it is unlikely on this record that the Court could reach the Constitutional issue;

(3) The cases relied upon by the State are distinguishable on the law and facts;

(4) The State fails to address the issue decided by the Illinois Supreme Court;

(5) The State fails to provide any basis upon which this Court should exercise its discretion.

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TABLE OF AUTHORITIES

CASES

STATUTES

No. 85-608

IN THE
SUPREME COURT OF THE
UNITED STATES

October Term, 1985

STATE OF ILLINOIS,

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vs.

ALBERT KRULL, GEORGE LUCAS
and SALVATORE MUCERINO,

Respondents.

RESPONDENTS' CONSOLIDATED BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

NATURE OF THE CASE[1]

On September 25, 1981, the trial court granted Defendants' joint motion to suppress evidence seized pursuant to a warrantless administrative search. The search was conducted on July 5, 1981, on the business premises of Action Iron & Metal, Inc. by police officers ostensibly under the authority of Ill. Rev. Stat., Ch. 95-1/2, Section 5-401(e) (1981).[2] The State appealed the decision to the Illinois Appellate Court.

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[1]All citations designated as "Supp. R." refer to the findings of the Trial Court upon remand. All citations designated as "R." refer to the official Record on Appeal. All citations to those items which were the subject of Defendants' Motion to Supplement the Record filed on January 9,1985 shall be designated as "Dft.M. Supp. R.".

[2]Sections 5-401 et seq. provided for administrative searches for certain purposes of businesses engaged in acquiring, wrecking, recycling, rebuilding and/or selling autmotive parts. Krull R. 11-17, Exhibit B.

Judge Milton I. Shadur of the United States District Court for the Northern District of Illinois had, previous to the trial court's ruling, declared Section 5-401(e) unconstitutional in Cause No. 80 C 3696 on July 6, 1981.[3] The decision of the District Court was appealed to the Seventh Circuit Court of Appeals. During the pendency of the appeal, the Illinois Legislature promulgated Section 5-403 (eff. Jan. 1, 1983) consistent with the mandate of the District Court opinion.

In light of the new enactment, the Seventh Circuit determined on August 23, 1983 that Section 5-403 as enacted was constitutional. The Seventh Circuit

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[3]Defendant Krull and Action Iron & Metal,Inc. filed a Complaint for Injunctive and Declaratory Relief subsequent to the search on July 5, 1981. The case was consolidated by Judge Shadur with 80 C 3696 and Defendant Krull and Action Iron & Metal, Inc. were included as parties in Judge Shadur's order.

specifically declined to review Judge Shadur's decision holding Section 5-401(e) unconstitutional. Judge Shadur's order was affirmed in part and vacated in part on other grounds.

The Illinois Appellate Court was advised of the Seventh Circuit's decision. On November 23, 1983, the Illinois Appellate Court vacated the trial court's order and remanded the case to the trial court to consider certain specific questions on remand. The State did not appeal the decision of the Appellate Court. On remand, the trial court again granted Defendants' motion to suppress. The State appealed directly to the Illinois Supreme Court.[4]

---

[4]The Appellate Court had specifically remanded the case with the intention that the matter be returned to tne Appellate Court for further consideration. The Court states:

In the present case, the State

FACTS

Prior to the warrantless entry onto the business premises of Action Iron & Metal, Inc., various auto yards regulated by Section 5-401(e) filed a Complaint on July 21, 1980, in the United States District Court for the Northern District of Illinois to declare Section 5-401(e) unconstitutional. The suit, captioned Bionic Auto Parts, et al. v. Fahner, et al., 80 C 3696, was filed against the Illinois Attorney General, the Chicago Police Department, the Illinois Secretary of State and the State's Attorney of Cook

---

argues that the police acted in good faith. This contention might be of significant import in the ultimate resolution of this case. However, we believe that this assertion requires a factual determination by the trial court. The matter should therefore be remanded for that determination in order that we might then evaluate the State's claim. (Emphasis added).

County.

While that case was being decided, Detective Leland McNally, Badge No. 12157, an agent of the Defendant, Chicago Police Department, entered the premises of Action Iron & Metal, Inc. on July 5, 1981, at approximately 10:30 a.m. for the ostensible purpose of performing a records inspection pursuant to Ill. Rev. Stat., Ch. 95-1/2, Section 5-401(e) (1981). (Supp.R. 4). Detective McNally did not have a search warrant or arrest warrant. There was no probable cause for any of the officers to believe a crime was being committed or, in fact, had been committed. (Supp.R. 6).

Based upon the fruits of the search and property seizures described above, Defendants were charged with various motor vehicle violations either involving possession of stolen motor vehicles,

failure to surrender proper certificates of title or failure to obtain a junking certificate as required by statute. (Ill. Rev. Stat., Ch. 95-1/2, Sections 4-103(a)(1), 4-103(a)(4), and 3-116(c) (1981)).

On July 6, 1981, Judge Milton I. Shadur, United States District Court for the Northern District of Illinois, held Section 5-401(e) unconstitutional. Based upon the District Court's decision, Defendant Krull filed a "Motion to Suppress Evidence" in the pending state court criminal proceeding. The motion was adopted by all defendants. A hearing was held on the motion in the above-captioned proceeding on September 25, 1981, and the motion was granted.

The trial court found that the search authorized by Section 5-401(e) was a "two-step" process. (Supp.R. 5).

First, the officer is entitled to examine the records required to be kept by the licensee. Second, the officer may then search the business premises for the limited purpose of verifying that the records are accurate.

However, the trial court determined that Detective McNally exceeded his authority under the statute. Detective McNally conducted a search of the entire business premises that was not limited to a verification of the records. The trial court rejected the State's argument that even if McNally exceeded the scope of the statutory authority, the search was conducted pursuant to Defendants' consent. These findings were reiterated by the trial court on remand. (Supp.R. 6). The Appellate Court did not disturb the trial court's findings on those points.

Moreover, during the proceeding be-

fore Judge Shadur, the State stipulated that Defendant Lucas did not consent to the search and that Lucas only agreed to Detective McNally's entry onto the premises because he believed he had no choice pursuant to Section 5-401(e). A copy of the Stipulation filed with the United States District Court is attached as Appendix A.

On remand from the Appellate Court, the trial court was asked to consider certain specific issues. First, the Court had to determine if the as yet unadopted "good faith" exception to the exclusionary rule, validating as proper an otherwise improper evidentiary seizure, should be applied to this case. Second, the Court had to determine whether the police officials, as a matter of fact, acted in "good faith" in conducting the instant search and seizure if the new

standard was to be applied. Third, the Court had to determine whether Section 5-401(e), under which Detective McNally conducted the search in question, remains unconstitutional.

The trial court addressed the issue of the good faith exception to the exclusionary rule. Specifically, the Appellate Court requested the Judge to consider this issue in view of the Supreme Court's decision in Illinois v. Gates, 462 U.S. 213 (1983). (Supp.R. 9).

The trial court concluded inter alia that the Gates case was distinguishable because the "good faith" exclusion did not apply to a situation where the statute authorizing the administrative search negated the warrant requirement in the first instance. Gates specifically addresses the situation where an unlawful search is conducted pursuant to the is-

suance of a search warrant. (Supp.R. 9-10).

Finally, the trial court found that as a matter of fact Detective McNally's search exceeded the authority granted by Section 5-401(e) in executing the search and that the search was not a consent search. (Supp.R. 5).

ARGUMENT

A.

An Arrest And Search Made Pursuant To A Procedural Statute, Not Yet Declared Unconstitutional And Which Authorizes Unlawful Searches, Will Not Be Upheld Even Though The Arrest And Search Were Made In Good Faith Reliance On The Statute.

Significantly, the State does not address, anywhere in its brief, the precise issues of law and fact actually decided by the Illinois Supreme Court in the opinion below.

The Illinois Supreme Court rejected the State's argument on the following grounds. The Illinois Supreme Court re-

jected the State's attempt to compare the present case to Michigan v. DeFillippo, 443 U.S. 31 (1979) where the Supreme Court of the United States upheld an arrest made pursuant to an ordinance which was subsequently found to be invalid.

The Illinois Supreme Court pointed out that the Supreme Court of the United States continues to utilize the substantive-procedural dichotomy in determining whether a search conducted pursuant to a statute is invalid. The Court concluded that good faith reliance on a statute defined as "procedural" in nature will not cure an otherwise illegal search. The Court states:

> In holding the search constitutional, however, the Supreme Court in DeFillippo distinguished between substantive laws, which define criminal offenses, and procedural laws, which directly authorize searches. An arrest and search conducted pursuant to a substantive law like the

Detroit ordinance will be upheld provided the officer has probable cause to make the arrest and he relied on the statute in good faith. In contrast, an arrest and search made pursuant to a procedural statute, not yet declared unconstitutional, and which authorizes unlawful searches, will not be upheld, even though the arrest and search were made in good-faith reliance on the statute. (443 U.S. 31, 39, 61 L.Ed.2d 343, 351, 99S. Ct. 2627, see, e.g., Torres v. Puerto Rico, (1979), 4424 U.S. 465, 61 L. Ed.2d 1, 99 S. Ct. 2425...The court continues to utilize the substantive-procedural dichotomy in determining whether a search conducted pursuant to a statute was valid. United States v. Leon, (1984), 468 U.S. ____, 82 L.Ed.2d 677, 691, 104 S. Ct. 3405, 3415-16; see e.g., Ybarra v. Illinois (1979), 444 U.S. 85, 62 L. Ed.2d 238, 100 S. Ct. 338.

Section 5-401(e), unlike the Detroit ordinance in DeFillippo, did not define a substantive criminal offense. Rather, it directly authorized warrantless searches. Thus section 5-401(e) is included in the category of statutes which the Supreme Court has defined as procedural. Any good-faith reliance on such a statute will

> not cure an otherwise illegal search. See, e.g., Almeida-Sanchez v. United States, (1973), 413 U.S. 266, 37 L. Ed. 2d 596, 93 S. Ct. 2535; Sibron v. New York, (1968), 392, U.S. 40, 20 L. Ed. 2d 917, 88 S. Ct. 1889; Berger v. New York, (1967), 338 U.S. 41, 18 L. Ed.2d 1040, 87 S. Ct. 1873.

Notably, the Illinois Supreme Court relied on the reasoning of the Leon decision, 468 U.S. ____, 104 S.Ct. 3405, to support its holding. In Leon, this Court reaffirmed its earlier decision in Michigan v. DeFillippo stating:

> We have held, however, that the exclusionary rule requires suppression of evidence obtained in searches carried out pursuant to statutes, not yet declared unconstitutional, purporting to authorize searches and seizures without probable cause or search warrants. (citations omitted). Those decisions involved statutes which by their own terms authorized searches under the circumstances which did not satisfy the traditional warrant and probable-cause requirements of the Fourth Amendment. Michigan v. DeFillippo, 43 U.S. 31, 39 (1979). The substantive Fourth

> Amendment principles announced in those cases are fully consistent with our holding here. Leon, 468 U.S. ____, 104 S.Ct. at 3415, f.n. 8.

Even assuming arguendo that the search was conducted in good faith, this Court's recent decision in the Leon case would not change the result as the State argues. The decision of the Illinois Supreme Court consistently applies an unbroken line of authority reaffirmed by this Court. That authority stands for the proposition that the exclusionary rule applies to exclude evidence where the state statute, not previously declared unconstitutional, purports to authorize searches and seizures without probable cause or search warrants. The Federal District Court, the Illinois trial court, the Illinois Appellate Court and the Illinois Supreme Court agree that the state statute in question purports to

authorize search and seizures without probable cause or search warrants. Indeed, the State is not appealing that determination here. In response to those decisions, the Illinois legislature amended the Statute to comport with the constitutional requirements of the Fourth Amendment.

This Court's own prior decisions are controlling and certiorari should not be granted.

B.

Additional Reasons That Certiorari Should Be Denied:

(1) The decision below gave full consideration to the issues and decided them in conformity with the precedent established by this Court.

The State's argument is merely repetitive of the position that it has taken throughout the appellate history of this case. That argument never changes to account for the distinctions and points raised by the various courts of

review that have considered the State's position.

The decision of the Illinois Supreme Court takes into account this Court's recent decision in Leon, and carefully analyzes the issues raised by the state. The Court's decision as indicated in point A above is in conformity with the established precedent of this Court.

(2) The State mischaracterizes the facts and therefore, it is unlikely on this record that the Court could reach the constitutional issue.

The State maintains in Argument II that the search "took place in good faith" or in the alternative, with the consent of Defendants prior to the District Court's decision declaring the State statute unconstitutional.

First, the State's factual argument is not an accurate recitation of the facts found by the trial court. In fact, the State's factual argument is specific-

ally contradicted by the trial court's finding. The trial court held that the search went beyond the officer's limited authority to verify the accuracy of the records that he was given by Defendants.

Second, the trial court, the Appellate Court and the Supreme Court held that Lucas did not consent to the search. Therefore, even assuming that the officers reasonably relied on the authority granted to them by the statute, the officers failed to conduct the search according to the requirements of the statute. The officers had no probable cause, search warrant, consent or other independent basis to legitimize the search. Therefore, the officers did not act in good faith. People v. Krull, 107 Ill.2d 107, 119-120 (1985).

Indeed, the State stipulated in the Federal District Court proceeding (Appen-

dix A) that the search was not a consent search. Yet the State persists in characterizing the search as a consent search in its Petition.

Therefore, this Court could not, based upon the instant record, reach the constitutional issue raised by the State inasmuch as the police officers did not conduct the search in good faith reliance on the statute.

(3) The cases relied upon by the State are distinguishable on the law and facts.

The Illinois Supreme Court specifically held that the State's attempt to compare this case to the Supreme Court's decision in Michigan v. DeFillippo, was distinguishable.

Additionally, the State specifically relies on the Court's opinion in Almeida-Sanchez v. United States, 413 U.S.266 (1973) and other "good faith" border

search cases such as United States v. Peltier, 422 U.S. 531 (1975). However, the Supreme Court explicitly stated in the DeFillippo opinion that, where the federal statute permitting border searches within a "reasonable distance" of the border was declared unconstitutional, the search was held invalid in Almeida-Sanchez despite the fact that the statute had not been declared unconstitutional at the time of the search.

The cases cited by the State simply do not stand for the proposition of law urged by the State. In fact, the cases explicitly hold that the exclusionary rule applies to exclude evidence where the state statute, not previously declared unconstitutional, directly authorizes an unconstitutional search.

Finally, the cases cited by the State are inapposite. The Supreme Court

of the United States has made a critical distinction between cases involving particular conduct by the police that violates the Fourth Amendment policies and those cases where state law purporting to authorize such conduct violates the Fourth Amendment. Justice Brennan explains this distinction in the case Kolender v. Lawson, 461 U.S. 352, 75 L.Ed.2d 903, 912 (1983):

> We have not in recent years found a state statute invalid directly under the Fourth Amendment, but we have long recognized that the government may not "authorize police conduct which trenches upon Fourth Amendment rights, regardless of the labels which it attaches to such conduct." Sibron v. New York, 392 U.S. 40, 61, 20 L.Ed.2d 917, 88 S. Ct. 1889, 44 Ohio Ops 2d 402 (1968). In Sibron, and in numerous other cases, the Fourth Amendment issue arose in the context of a motion by the defendant in a criminal prosecution to suppress evidence against him obtained as the result of a police search or seizure of his person or property. The ques-

> tion thus has always been whether particular conduct by the police violated the Fourth Amendment, and we have not had to reach the question whether state law purporting to authorize such conduct also offended the Constitution. In this case, however, appellee Edward Lawson has been repeatedly arrested under authority of the California statute, and he has shown that he will likely be subjected to further seizures by the police in the future if the statute remains in force. (Citations Omitted). It goes without saying that the Fourth Amendment safeguards the rights of those who are not prosecuted for crimes as well as the rights of those who are.

The cases cited by the State do not address the situation where state law purports to authorize conduct that offends the Constitution.

The State argues at some length that the purpose of the exclusionary rule would not be served in this case because police officers were acting in good faith. The argument is misplaced. The issue in this case is not focused upon

the conduct of police officers but upon the state law that purports to authorize conduct which offends the Constitution. No amount of good faith conduct can cure that constitutional defect.

In this case, the statute has authorized an inspection scheme as a substitute for the constitutional safeguards afforded every citizen by the Fourth Amendment as a matter of right. The Illinois legislature may not authorize police conduct which trenches upon Fourth Amendment rights, regardless of what labels it attaches to the conduct.

(4) The State fails to address the issue decided by the Illinois Supreme Court.

As noted above, the State does not address the "substantive-procedural dichotomy" issue articulated by the Illinois Supreme Court in deciding the constitutional issue on appeal.

Likewise, the State does not address the Illinois Supreme Court's analysis of the Leon and DeFillippo decisions. Nor does the State raise in its Petition the issue of the court's findings that the search was not conducted in good faith under any circumstances.

(5) The State fails to provide any basis upon which this Court should exercise its discretion.

Rule 17 of the Rules of Practice of the Supreme Court of the United States provides various "considerations" governing review on certiorari. The State does not rest its Petition on any of these considerations. Indeed, the State makes no argument whatsoever regarding the reason that this Court should exercise its judicial discretion. The rule provides that certiorari "will be granted only when there are special and important reasons therefor." Because the

State has not addressed this issue, this Court does not have an articulated basis upon which to exercise its discretion.

CONCLUSION

The Illinois Supreme Court decided that an arrest and search made pursuant to a procedural statute, not yet declared unconstitutional, and which authorizes unlawful searches, will not be upheld even though the arrest and search were made in good faith reliance on the statute. This decision is in conformity with the long line of cases previously decided by this Court.

The State has not addressed the issue decided by the Illinois Supreme Court in its Petition for Writ of Certiorari. Nor has the State established that this Court could reach the constitutional issue based upon the record in the case.

For all of the reasons stated herein, the State's Petition should be denied and certiorari should not be granted.

Respectfully submitted,

One of the Attorneys for the Respondents

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Attorney for George Lucas

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ALBERT G. KRULL and ACTION IRON & METAL, INC., an Illinois Corporation,	)	
Plaintiffs,	)	
vs.	)	No. 81 C 4907
TRYONE FAHNER, ATTORNEY GENERAL OF ILLINOIS, JIM EDGAR, SECRETARY OF STATE OF ILLINOIS, RICHARD M. DALEY, STATES ATTORNEY OF COOK COUNTY, ILLINOIS, RICHARD BRZECZEK, SUPERINTENDENT OF THE POLICE DEPARTMENT OF THE CITY OF CHICAGO, ILLINOIS,	)	
Defendants.	)	

STIPULATION

It is hereby stipulated by and between the Plaintiffs, ACTION IRON & METAL, INC., and ALBERT KRULL, by their respective attorneys, Louis B. Garippo and Miriam F. Miquuelon, and the De-

fendant , RICHARD M. DALEY, State's Attorney of Cook County, Illinois, by his attorney, Elizabeth Cohen, Assistant State's Attorney, that:

1. Plaintiff, ACTION IRON & METAL INC., is a corporation licensed to do business in the State of Illinois and has its principal place of business in the State of Illinois. (A true and correct copy of Plaintiff's license is attached as Exhibit A).

2. Plaintiff, ACTION IRON & METAL, INC., is licensed by the State of Illinois, pursuant to Chapter 95-½, Section 5-301 (Ill. Rev. Stat., 1979) to engage in the business of acquiring, wrecking, recycling, rebuilding and selling automobile parts.

3. Plaintiff, ALBERT G. KRULL, is a duly authroized agent of Plaintiff, ACTION IRON & METAL, INC.

4. The Defendant, Secretary of State, promulgated Rule 5-401(a) pursuant to the enactment of Chapter 95½, Section 5-401(e), Ill. Rev. Stat., 1979.

5. The licensee has been subject to administrative searches pursuant to Chapter 95½, Section 5-401(e) and Rule 5-401(a) on several occasions in or about July, 1981. The searches were conducted without warrant or other legal process and without probable cause. If any form of consent was given by Plaintiffs or their agents permitting entry on to the business premises to conduct the aforementioned searches, such consent was predicated upon Plaintiffs' belief that the statutory authority contained in Chapter 95½, Section 5-401 et seq., declared unconstitutional in Bionic v. Fahner, No. 80 C 3696, authorized Defendants or their agents to conduct the

above-described searches and seizures.

6. Plaintiffs did not receive any prior notification, either written or oral, regarding the Defendants' or their agents' intentions to enter the business premises on the aforementioned dates.

7. On or about July 20, 1981, Plaintiff, KRULL, was arrested by agents of the Defendant, RICHARD BRZECZEK. Plaintiff, KRULL's arrest directly resulted from the seizure of certain vehicular equipment on July 5, 1981, by agents of the Defendant, BRZECZEK during a search conducted pursuant to Chapter 95½, Section 5-401 et seq.

8. Plaintiffs waive their right to demand attorney fees and costs for the preparation and trial of this case at the District Court level only.

9. Plaintiffs are seeking declaratory and injunctive relief only.

Respectfully submitted,

_____
Plaintiff,
Action Iron & Metal, Inc.

_____
Miriam F. Miquelon, Attorney for Plaintiff,
Albert G. Krull

_____
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Dated: _____

(3)

No. 85-608

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE STATE OF ILLINOIS, *Petitioner,*

vs.

ALBERT KRULL, et al., *Respondents.*

On Writ Of Certiorari To The Supreme Court Of Illinois

JOINT APPENDIX

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The Opinion of the Supreme Court of Illinois Is Reported at 107 Ill. 2d 107, 481 N.E.2d 703 (1985) and is Included in the Petition for Certiorari at the Appendix.

The Opinion of the United States District Court for the Northern District of Illinois Declaring Ill. Rev. Stat. 1979, Ch. 95½, Sec. 5-401 Unconstitutional Appears in *Bionic Auto Parts and Sales, Inc. et al. v. Tyrone C. Fahner*, 518 F. Supp. 582 (N.D. Ill. 1981) and the Opinion of the Seventh Circuit Court of Appeals in that Case Appears at 721 F.2d 1072 (7th Cir. 1983).

No. 85-608

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE STATE OF ILLINOIS, *Petitioner,*

vs.

ALBERT KRULL, et al., *Respondents.*

On Writ Of Certiorari To The Supreme Court Of Illinois

JOINT APPENDIX

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DATE	ITEM
July 5, 1981	Complaints filed in the Circuit Court of Cook County, Illinois
September 18, 1981	Respondents' Motion to Suppress Evidence Filed
September 25, 1981	Order of the Honorable Martin F. Hogan Granting Respondents' Motion to Suppress Evidence
October 14, 1981	Notice of Appeal Filed
November 23, 1983	Order of the Appellate Court of Illinois, First Judicial District, Disposing of Appeal Under Illinois Supreme Court Rule 23 and Remanding to the Trial Court for Further Proceedings
July 9, 1984	Order of the Honorable Martin F. Hogan Granting Respondents' Motion to Suppress Evidence
August 7, 1984	Notice of Appeal Filed
July 17, 1985	Opinion of the Supreme Court of Illinois

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS

The People of the State of Illinois, Plaintiff,

v. No. 81 MC1-219293

Salvatore Mucerino, Defendant.

COMPLAINT FOR PRELIMINARY EXAMINATION

Detective Leilan K. McNally #12157 complainant, now appears before The Circuit Court of Cook County and states that Salvatore Mucerino has, on or about July 5, 1981 at Cook County Illinois committed the offense of possession of stolen motor vehicle in that he was not entitled to the possession of a motor vehicle, and did possess a 1969 AMC Rambler V.I.N. A9A050A284339 knowing it to have been stolen. Said vehicle was the property of Kevin Daly, in violation of Chapter 95½, Section 4-103a1, Illinois Revised Statutes.

/s/ Leilan K. McNally #12157

State of Illinois
County of Cook—ss.

Detective Leilan K. McNally #12157 being first duly sworn, on his oath, deposes and says that he has read the foregoing complaint by him subscribed and that the same is true.

/s/ Leilan K. McNally #12157

Subscribed and sworn to before me July 30, 1981.

/s/ Morgan M. Finley, Clerk

* * * * *

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS

The People of the State of Illinois, Plaintiff,

v. No. 81 MC1-219294-01

Albert G. Krull, Defendant.

COMPLAINT FOR PRELIMINARY EXAMINATION

State of Illinois Agent Leilan K. McNally #12157 complainant, now appears before The Circuit Court of Cook County and states that Albert G. Krull has, on or about July 20, 1981 at Cook County Illinois committed the offense of failure to surrender title in that he failed to surrender certificate of title to obtain a junking certificate of title as required by law. The vehicle involved is a 1969 Chevrolet V.I.N. 164479F099576, in violation of Chapter 95½, Section 3-116, Illinois Revised Statutes.

/s/ Leilan K. McNally #12157

State of Illinois
County of Cook—ss.

State of Illinois Agent Leilan K. McNally #12157 being first duly sworn, on his oath, deposes and says that he has read the foregoing complaint by him subscribed and that the same is true.

/s/ Leilan K. McNally #12157

Subscribed and sworn to before me July 30, 1981.

/s/ Morgan M. Finley, Clerk

* * * * *

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS

The People of the State of Illinois, Plaintiff,
v. No. 81 MC1-219294-02
Albert G. Krull, Defendant.

COMPLAINT FOR PRELIMINARY EXAMINATION

State of Illinois Agent Leilan K. McNally #12157 complainant, now appears before The Circuit Court of Cook County and states that Albert G. Krull has, on or about July 20, 1981 at Cook County Illinois committed the offense of failure to surrender title in that he failed to surrender certificate of title to obtain a junking certificate of title as required by law. Vehicle involved is a 1972 American Motors Hornet V.I.N. A2A057E285867, in violation of Chapter 95½, Section 3-116, Illinois Revised Statutes.

/s/ Leilan K. McNally #12157

State of Illinois
County of Cook—ss.

State of Illinois Agent Leilan K. McNally #12157 being first duly sworn, on his oath, deposes and says that he has read the foregoing complaint by him subscribed and that the same is true.

/s/ Leilan K. McNally #12157

Subscribed and sworn to before me July 30, 1981.

/s/ Morgan M. Finley, Clerk

* * * * *

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS

The People of the State of Illinois, Plaintiff,
v. No. 81 MC1-219294-03
Albert G. Krull, Defendant.

COMPLAINT FOR PRELIMINARY EXAMINATION

State of Illinois Agent Leilan K. McNally #12157 complainant, now appears before The Circuit Court of Cook County and states that Albert G. Krull has, on or about July 20, 1981 at Cook County Illinois committed the offense of failure to surrender title in that he failed to surrender certificate of title to obtain junking certificate of title, as required by law. Vehicle involved is a 1978 International Scout V.I.N. H0062HGD44014, in violation of Chapter 95½, Section 3-116, Illinois Revised Statutes.

/s/ Leilan K. McNally #12157

State of Illinois
County of Cook—ss.

State of Illinois Agent Leilan K. McNally #12157 being first duly sworn, on his oath, deposes and says that he has read the foregoing complaint by him subscribed and that the same is true.

/s/ Leilan K. McNally #12157

Subscribed and sworn to before me July 30, 1981.

/s/ Morgan M. Finley, Clerk

* * * * *

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS

The People of the State of Illinois, Plaintiff,
v. No. 81 MC1-219294-04
Albert G. Krull, Defendant.

COMPLAINT FOR PRELIMINARY EXAMINATION

State of Illinois Agent Leilan K. McNally #12157 complainant, now appears before The Circuit Court of Cook County and states that Albert G. Krull has, on or about July 20, 1981 at Cook County Illinois committed the offense of failure to surrender title in that he failed to surrender certificate of title to obtain junking certificate of title as required by law. Vehicle involved is a 1971 Dodge V.I.N. DH41L1D269531, in violation of Chapter 95½, Section 3-116, Illinois Revised Statutes.

/s/ Leilan K. McNally #12157

State of Illinois
County of Cook—ss.

State of Illinois Agent Leilan K. McNally #12157 being first duly sworn, on his oath, deposes and says that he has read the foregoing complaint by him subscribed and that the same is true.

/s/ Leilan K. McNally #12157

Subscribed and sworn to before me July 30, 1981.

/s/ Morgan M. Finley, Clerk

* * * * *

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS

The People of the State of Illinois, Plaintiff,
v. No. 81 MC1-219365-01
Albert G. Krull, Defendant.

COMPLAINT FOR PRELIMINARY EXAMINATION

State of Illinois Agent Leilan K. McNally #12157 complainant, now appears before The Circuit Court of Cook County and states that Albert G. Krull has, on or about July 20, 1981 at Cook County Illinois committed the offense of failure to surrender title in that he failed to surrender certificate of title to obtain a junking certificate of title as required by law. The vehicle involved is a 1969 Chevrolet V.I.N. 164479F099576, in violation of Chapter 95½, Section 3-116, Illinois Revised Statutes.

/s/ Leilan K. McNally #12157

State of Illinois
County of Cook—ss.

State of Illinois Agent Leilan K. McNally #12157 being first duly sworn, on his oath, deposes and says that he has read the foregoing complaint by him subscribed and that the same is true.

/s/ Leilan K. McNally #12157

Subscribed and sworn to before me _____, 19____.

/s/ _____, Clerk

* * * * *

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS

The People of the State of Illinois, Plaintiff,

v. No. 81 MC1-219365-02

Albert G. Krull, Defendant.

COMPLAINT FOR PRELIMINARY EXAMINATION

State of Illinois Agent Leilan K. McNally #12157 complainant, now appears before The Circuit Court of Cook County and states that Albert G. Krull has, on or about July 20, 1981 at Cook County Illinois committed the offense of failure to surrender title in that he failed to surrender certificate of title to obtain a junking certificate of title as required by law. Vehicle involved is a 1972 American Motors Hornet V.I.N. A2A057E285867, in violation of Chapter 95½, Section 3-116, Illinois Revised Statutes.

/s/ Leilan K. McNally #12157

State of Illinois
County of Cook–ss.

State of Illinois Agent Leilan K. McNally #12157 being first duly sworn, on his oath, deposes and says that he has read the foregoing complaint by him subscribed and that the same is true.

/s/ Leilan K. McNally #12157

Subscribed and sworn to before me _____, 19____.

/s/ _____, Clerk

* * * * *

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS

The People of the State of Illinois, Plaintiff,

v. No. 81 MC1-213926-01

George Lucas, Defendant.

COMPLAINT FOR PRELIMINARY EXAMINATION

Alfred Sims complainant, now appears before The Circuit Court of Cook County and states that George Lucas has, on or about 5 July 1981 at 3315 West 31st. Street, Chicago, Illinois committed the offense of Possession Of Stolen Vehicle in that he not being entitled to possession of a vehicle, to wit: 1971 Dodge, bearing VIN DH41L1D269531, possessed said vehicle, knowing it to have been stolen, in violation of Chapter 95½, Section 4-103 A-1, Illinois Revised Statutes.

/s/ L. K. McNally #12157

State of Illinois
County of Cook–ss.

Alfred Sims being first duly sworn, on his oath, deposes and says that he has read the foregoing complaint by him subscribed and that the same is true.

/s/ L. K. McNally #12157

Subscribed and sworn to before me _____, 19____.

/s/ _____, Clerk

* * * * *

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS

The People of the State of Illinois, Plaintiff,

v. No. 81 MC1-213926-02

George Lucas, Defendant.

COMPLAINT FOR PRELIMINARY EXAMINATION

John O'Connor complainant, now appears before The Circuit Court of Cook County and states that George Lucas has, on or about 5 July 1981 at 3315 West 31st. Street, Chicago, Illinois committed the offense of Possession Of Stolen Vehicle in that he not being entitled to possession of a vehicle, to wit: 1972 American Motors Hornet, bearing VIN#A2A057E285867, possessed said vehicle, knowing it to have been stolen, in violation of Chapter 95½, Section 4-103-A-1, Illinois Revised Statutes.

/s/ Det. L. K. McNally #12157

State of Illinois
County of Cook—ss.

John O'Connor being first duly sworn, on his oath, deposes and says that he has read the foregoing complaint by him subscribed and that the same is true.

/s/ Det. L. K. McNally #12157

Subscribed and sworn to before me _____, 19____.

/s/ _____, Clerk

* * * * *

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS

The People of the State of Illinois, Plaintiff,

v. No. 81 MC1-213926-03

George Lucas, Defendant.

COMPLAINT FOR PRELIMINARY EXAMINATION

Milton Medlock complainant, now appears before The Circuit Court of Cook County and states that George Lucas has, on or about 5 July 1981 at 3315 West 31st Street, Chicago, Illinois committed the offense of Possession Of Stolen Vehicle in that he not being entitled to possession of a vehicle, to wit; 1969 Chevrolet, bearing VIN 164479F099576, possessed said vehicle, knowing it to have been stolen, in violation of Chapter 95½, Section 4-103A-1, Illinois Revised Statutes.

/s/ Det. L. K. McNally #12157

State of Illinois
County of Cook—ss.

Milton Medlock being first duly sworn, on his oath, deposes and says that he has read the foregoing complaint by him subscribed and that the same is true.

/s/ Det. L. K. McNally #12157

Subscribed and sworn to before me _____, 19____.

/s/ _____, Clerk

* * * * *

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS

The People of the State of Illinois, Plaintiff,

v. No. 81 MC1-213926-04

George Lucas, Defendant.

COMPLAINT FOR PRELIMINARY EXAMINATION

State of Illinois, Det. L. McNally #12157 complainant, now appears before The Circuit Court of Cook County and states that George Lucas has, on or about 5 July 1981 at 3315 West 31st Street, Chicago, Illinois committed the offense of False Manufacturer's Identification Number in that he possessed a motor vehicle, to wit; 1978 International vehicle, on which the manufacturer's identification number had been removed and said, George Lucas, had knowledge that said number had been removed, in violation of Chapter 95½, Section 4-103, A-4, Illinois Revised Statutes.

/s/ L. McNally #12157

State of Illinois
County of Cook—ss.

State of Ill. Det. L. McNally #12157 being first duly sworn, on his oath, deposes and says that he has read the foregoing complaint by him subscribed and that the same is true.

/s/ Det. L. McNally #12157

Subscribed and sworn to before me _____, 19____.

/s/ _____, Clerk

* * * * *

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff,

No. *v.*

ALBERT G. KRULL,

Defendant.

MOTION TO SUPPRESS EVIDENCE
ILLEGALLY SEIZED

Now comes the Defendant, ALBERT G. KRULL, by his attorney, Miriam F. Miquelon, and pursuant to Chapter 38, Section 114-12(1) (Ill. Rev. Stat., 1979) submits this Motion to Suppress Evidence and in support states as follows:

1. Defendant, Krull is charged in the instant proceeding with violations of Chapter 95½, Section 3-116(e) for Defendant's alleged failure to surrender certificates of title for certain vehicles described as 1971 Dodge V.I.N. DH41L1D269531 and 1978 International Scout V.I.N. H0062H6D44014. The respective vehicles are described in two separate complaints that serve as the basis of the instant charge. (Exhibit A).

2. On or about July 20, 1981, Agent Leilan K. McNally, #1257, entered the business premises of the Action, Iron & Metal, Inc., for the ostensible purpose of performing a records inspection pursuant to Chapter 95½, Section 5-401(e), (Ill. Rev. Stat., 1979). (Exhibit B) The agent did not have a search warrant in his possession at the time

of entry nor did the Defendant consent to the agent's entry onto the business premises for any purpose.

3. Defendant, Krull is licensed by the State of Illinois, pursuant to Chapter 95½, Section 5-301 to engage in the business of acquiring, wrecking, recycling, rebuilding and selling automotive parts. Defendant, Krull hold the license for Action, Iron & Metal, Inc.

4. During his review of the business records, Agent McNally conducted a warrantless search of the business premises. Presumably the search was conducted pursuant to the provisions of Chapter 95½, Section 5-401(e). It is unclear that Agent McNally located the above-described vehicles while conducting the search. The complaint alleges that defendant-licensee failed to surrender the certificate of title on either vehicle. Upon information and belief, the vehicles that are the subject of the instant complaint were seized by Agent McNally and towed from the business premises.

5. The confusion as to the precise date of seizure of the vehicles is based upon the following: the vehicle described as 1971 Dodge V.I.N. DH41L1D269531 is included in Agent McNally's police report dated July 5, 1981. (Exhibit G) There he states that the *same* vehicle was purchased by one George Lucas on or about July 3, 1981, which vehicle apparently served as the basis for Lucas' arrest. The report also refers to an International Scout but omits a reference to the V.I.N. number. Defendant submits that this vehicle may be one in the same as that which serves as the basis of the instant complaint. However, Agent McNally likewise contends that this vehicle was purchased by Lucas on July 3, 1981. Apparently, Agent McNally waited for some 17 days to request Defendant Krull to produce a certificate of title for vehicles that McNally had already seized. Defendant is likewise not

charged with having committed the offense on July 3, 1981, but on July 20, 1981. Defendant submits that he was not on the business premises on July 3, 1981, and had no knowledge of Lucas' business activity regarding the above-referenced vehicles.

6. On March 10, 1981, a Complaint for Declaratory and Injunctive Relief, No. 80 C 3696, was filed in the Federal District Court for the Northern District of Illinois and assigned to the Honorable Milton I. Shadur. The Complaint raised various questions of law and fact regarding the constitutionality of Chapter 95½, Sections 5-401 et seq. Judge Shadur issued an opinion declaring the provisions of the statute, permitting warrantless entry for the purpose of searching the records and business premises, of the licensee, unconstitutional.

7. On this basis, defendant-licensee moves to suppress evidence of the vehicles seized and any information obtained by law enforcement officers pursuant to a review of the records and/or business premises of the licensee. That defendant-licensee has standing to contest the search and seizure under these circumstances is implicit from the Supreme Court's opinions in the cases, *United States v. Biswell*, 406 U.S. 311 (1972) and *Colonnade Corp. v. United*, 397 U.S. 72 (1970). In those cases the licensee moved to suppress evidence on the basis that the statute authorizing warrantless entry and inspection was unconstitutional.

Regarding the issue of the validity of the search, the Supreme Court in *Biswell*, *supra*, concluded that:

> In the context of a regulatory inspection system of business premises that is carefully limited in time, place, and scope, the legality of the search depends not on consent but on the authority of a valid statute. 406 U.S. at 315.

In the instant case Judge Shadur found that the regulatory inspection scheme contained in Section 5-401 et seq. failed to circumscribe the time, place and scope of the search and was therefore, unconstitutional. The instant search was predicated on the authority of an invalid and unconstitutional statute and therefore, based on the principles of *Biswell*, is unconstitutional.

Evidence derived from this search will be introduced in the preliminary hearing and/or trial of this case. Where evidence is sought to be introduced in a trial subsequent to a finding that it was obtained pursuant to an unconstitutional statute the evidence should be suppressed. See, *Fuller v. Alaska*, 393 U.S. 80 (1968).[1]

Moreover, the scope and legitimacy of a search must be strictly tied to and justified by the circumstances that rendered its initiation permissible. See, *People v. Lee*, 48 Ill.2d 272, 269 N.E.2d 488, 490-491. The instant search was invalid because the statute authorizing the search was found unconstitutional. Therefore, the evidence seized should be suppressed.

Where a warrantless search is conducted, it is settled that the burden is on those seeking an exemption from the requirements of the Fourth Amendment to show a need for it. *People v. Bayles*, 76 Ill.App.3d 843, 395 N.E. 2d 663, 669 (5th Dist. 1979). The people will be unable under any recognized exception to the warrant requirement to meet this burden.

---

[1] In *Fuller*, the court found that once its opinion issued indicating that evidence violative of §605 of the Federal Communications Act was not admissible in a State trial, such ruling was to be applied only to trials in which the evidence is sought to be introduced after the date of the decision.

WHEREFORE, the Defendant, ALBERT G. KRULL, by his attorney, requests the Court to suppress any evidence derived from the search of the licensee's records and/or business premises or from investigative leads discovered as a result of the search and for such other and further relief as the Court deems necessary in the interests of justice.

Respectfully submitted,

/s/ MIRIAM F. MIQUELON, Attorney for Defendant, Albert G. Krull.

Miquelon & Cotter, Ltd.
79 West Monroe Street
Suite 1010
Chicago, Illinois 60603
(312) 853-0100

Dated: Sept. 18, 1981

STATE OF ILLINOIS
COUNTY OF COOK—SS:

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT – MUNICIPAL DIVISION

Branch 64

THE PEOPLE OF THE STATE OF ILLINOIS

-vs-

SALVATORE MUCERINO, ALBERT KRULL, GEORGE LUCAS, JOHN KANDYBA, and JOSEPH KRAL

[1]* REPORT OF PROCEEDINGS

BE IT REMEMBERED that the above entitled cause came on for hearing on the 25th day of September, A.D., 1981, before the Honorable MARTIN F. HOGAN, Judge of said Court.

APPEARANCES:

HON. RICHARD M. DALEY, JR.,
State's Attorney of Cook County, by;

MR. STEVEN C. RUECKERT,
Assistant State's Attorney,
on behalf of the People;

* Numbers in brackets refer to the Official Court Reporter's pagination of the Report of Proceedings.

MR. LOUIS GARIPPO,
on behalf of Defendant Mucerino;

MS. MIRIAM MICQUELON,
on behalf of Defendant Albert Krull;

MR. JAMES OBBISH,
on behalf of Defendants Lucas, Kandyba, and Kral.

[29] THE COURT: Now, do you want to argue the motion? There's already been some statements made by—

MR. RUECKERT: They can go ahead.

THE COURT: Mr. Obbish, do you have any argument?

MR. OBBISH: Judge, my argument will be very brief.

It's obvious here, based on the officer's testimony, that the only basis for his search on July 5, 1981, was pursuant to the Statute of Chapter 95½, and for no other reason. He had no other probable cause. He had no arrest warrant for anyone on the premises or anyone he expected to find on the premises. He had no search warrant for the specific premises of Action Iron and Metal on the date in question; and without any further probable cause, he acted under what has now been determined to have been an unConstitutional Statute. I'd ask that the motion be sustained as to Mr. Lucas.

It's clearly shown that Mr. Lucas has very strong standing. He's there on July 5. He's the person in charge.

MR. RUECKERT: Is that it?

THE COURT: Yes. Go ahead.

MR. RUECKERT: First of all, I would again renew the motion as to Mr. Mucerino. My argument as to him would be only that. Second of all, the officer testified that [30] the first thing he did when he went in there was to ask Mr. Lucas to see the license of the building and the records.

Even under the order that Judge Shadur entered, that part is still legal. You can still do that. After that, he asked Mr. Lucas, who said, "I'm in charge here."

Mr. Lucas is the person who showed him the records. Mr. Lucas was the one taking the cars in. It's clear he's the only one there operating the business at that time. The officer testified when he went in there and asked for—after looking for the records, he asked Mr. Lucas if he could look around. Mr. Lucas said, "Sure, go right ahead."

That's a consent search. There was no warrant here. But Mr. Lucas gave consent for the officer to search. That's what he did.

I ask that the motion be denied.

THE COURT: All right. Mr. Lucas gave consent because he knew he couldn't withhold it pursuant to the Statute. This is not consent. This is merely allowing the officers to do what the defendant presumed the officer had a right to do at that time.

He knew he was authorized to go on there and walk around, so what's he going to say? No, you can't?

[31] I think it's unrealistic to believe that the consent was voluntary. It was done under duress of the Statute. That's how the consent was given.

MR. RUECKERT: Which, at the time, Judge, was legal. On July 5, it was legal.

THE COURT: I understand that.

Now, this prosecution is commencing based on a search that was conducted under a Statute which allowed it at the time it was made. It was a permissible activity.

Subsequent to the search and arrest, there was a declaration of unConstitutionality of that search. Now, it's the opinion of this Court that the subsequent declaration of unConstitutionality of that Statute affects all pending prosecutions not completed. And therefore, I'm going to

sustain the motion based on the District Court's ruling of unConstitutionality.

I believe once the Statute is deicared tainted, it's tainted forever and all prosecutions that have not been completed to judgment. That's the ruling of this Court.

MR. GARIPPO: As to all defendants?

THE COURT: As to all defendants.

MS. MICQUELON: Thank you, your Honor.

MR. OBBISH: State have a motion?

FOURTH DIVISION
November 23, 1983

81-2621, 81-2622, 81-2623
(Consolidated)

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellant,

vs.

ALBERT KRULL, SALVATORE MUCERINO, and GEORGE LUCAS,

Defendants-Appellees.

Appeal from the Circuit Court of Cook County.
Honorable Martin F. Hogan, Judge Presiding.

ORDER DISPOSING OF APPEAL UNDER SUPREME COURT RULE 23

The defendants in the present consolidated appeals were charged with several various motor vehicle violations either involving possession of stolen motor vehicles, failure to surrender proper certificates of titles or failure to obtain a junking certificate as required by statute. (Ill. Rev. Stat. 1981, ch. 95½, pars. 4-103(a)(1), 4-103(a)(4), and 3-116(c).) The court granted the defendants' motions to suppress evidence and the State has appealed. The State argues

that the warrantless administrative search without probable cause conducted under section 5-401(e) of the Illinois Vehicle Code (Ill. Rev. Stat. 1981, ch. 95½, par. 5-401(e)) was constitutional, thereby justifying a police search in this instance. Alternatively, the State argues that the officers in question acted in good faith when they relied on this statute should it be deemed unconstitutional. Defendants, as appellees, have not filed a brief in this matter, however, in view of our disposition of this case, we do not find that their failure to do so affects our disposition.

The facts surrounding the quashing of the search warrant revolve generally about the testimony of Officer McNally, who at 10:30 a.m. on July 5, 1981, entered the Action Iron and Metal Company yard and property, after he saw tow trucks bring several vehicles inside the grounds. McNally did not have an arrest warrant for defendant Lucas whom he encountered therein. Lucas said he was in charge of the premises. The defendant Krull was apparently the licensee of the premises, but he was not present. About one hour after the officer entered the premises, defendant Mucerino appeared.

The officer testified that he asked Lucas if he could look around and Lucas responded that the operation was open for business and that the officer could inspect the premises. Allegedly during the inspection the remnants of several stolen cars were uncovered, and one vehicle on the premises had a vehicle identification tag which had been removed.

The statute in question is section 5-401(e) of the Illinois Vehicle Code which provides:

> "Every record required to be maintained under this Section shall be opened to inspection by the Secretary of State or his authorized representative or any peace

officer for inspection at any reasonable time during the night or day. Such inspection may include examination of the premises of the licensee's established place of business for the purpose of determining the accuracy of required records."

During the hearing on the motion to suppress, the trial court was advised that one day following the search in question, a judge for the Federal district court of the Northern District of Illinois had found that section 5-401(e) was unconstitutional because it authorized warrantless administrative searches of businesses dealing in automotive parts and scrap processing, and that the district court had entered an injunction precluding the enforcement of the statute. *Bionic Auto Parts and Sales, Inc. v. Fahner* (N.D. Ill. 1981), 518 F. Supp. 582.

In rendering its decision in this case the trial court found that defendant Lucas had not consented to the search of the premises by the officer; that defendant Mucerino had standing to challenge the search; and because the district court in *Bionic Auto Parts* had declared the statute unconstitutional, even a prior search would be invalidated.

Recently the Federal court of appeals in *Bionic Auto Parts and Sales, Inc. v. Fahner* (7th Cir. 1983), ____ F.2d ____, partially set aside the district court's judgment. The court of appeals specifically declined to reach the constitutionality of section 5-401(e). Rather it considered that a newly-enacted statute concerning these administrative searches (Ill. Rev. Stat. 1982 Supp., Ch. 95½, par. 5-403, effective January 1, 1983) should be the governing law. The court of appeals concluded, in relevant part, that warrantless inspections authorized thereunder did not contravene Federal fourth amendment constitutional rights.

The *Bionic Auto Parts* case involved a civil action as compared to the present criminal matter. Therefore, in order to avoid any claim of an *ex post facto* violation, we believe that section 5-401(e) is still applicable to the present case.

However, based on recently evolving considerations it appears appropriate to vacate the judgment of the circuit court. In *Illinois v. Gates* (1983), ____ U.S. ____, 76 L. Ed. 2d 527, 103 S. Ct. 2317, the Supreme Court substantially modified its prior approach to validate the reliability of an informant for purposes of establishing probable cause to issue a search warrant. In so doing the Court did not consider the issue before it of whether the evidentiary seizure in question could be validated because the police had acted in good faith. Currently the Supreme Court has several matters before it concerning the issue of whether the good-faith conduct of police may otherwise validate evidentiary seizures deemed to be improper. See discussion in 52 U.S.L.W. 3201-3202.

In the present case the State argues that the police acted in good faith. This contention might be of significant import in the ultimate resolution of this case. However, we believe that this assertion requires a factual determination by the trial court. The matter should therefore be remanded for that determination in order that we might then evaluate the State's claim.

Further, the trial court in this instance accepted the action of the district court in *Bionic Auto Parts* as fully determinative concerning the resolution of the constitutionality of section 5-401(e). The court of appeals has now vacated the judgment of the district court insofar as it applies to the present case. Consequently, we believe that upon remand the trial court might also reconsider the con-

stitutionality of section 5-401(e) under which Officer McNally conducted the search in question. This will also permit the circuit court to re-examine the question of the standing of defendant Mucerino and whether the record properly established his right to question the warrantless administrative search conducted by the officer.

Accordingly, the judgment of the circuit court is vacated and the cause remanded for further proceedings consistent with this order.

Dated at Chicago, Illinois, this 23rd day of November, 1983.

Romiti, P.J., Jiganti, J., and Linn, J.

STATE OF ILLINOIS
COUNTY OF COOK–SS:

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT – MUNICIPAL DIVISION
FIRST DISTRICT

Room 1108
81-219294, 81-219365,
81-219293, 81-213926

THE PEOPLE OF THE STATE OF ILLINOIS

-vs-

ALBERT KRULL, GEORGE LUCAS, and SALVATORE MUCERINO, et al.

---

[1]* REPORT OF PROCEEDINGS

BE IT REMEMBERED that the above entitled cause came on for hearing before the Honorable MARTIN F. HOGAN JR., Judge of said Court on the 9th day of July, A.D., 1984.

APPEARANCES:

HON. RICHARD M. DALEY, State's Attorney of Cook County, by:
MS. CHERYL CESARIO,
Assistant State's Attorney,
on behalf of the People;

---

* Numbers in brackets refer to the Official Court Reporter's pagination of the Report of Proceedings.

MR. LOUIS B. GARIPPO,
on behalf of Mr. Mucerino;
MR. JAMES M. OBBISH,
on behalf of Mr. Lucas;
[2] MR. MARIAM MIQUELON,
on behalf of Mr. Krull.

[3] THE COURT: Do you want to step up here, and we'll discuss this?

People versus Mucerino, et al.

MR. OBBISH: Good afternoon, your Honor. For the record, James Obbish on behalf of George Lucas.

MR. GARIPPO: Louis Garippo, on behalf of the Defendant Salvatore Mucerino.

MR. MIQUELON: Mariam Miquelon, on behalf of Defendant Krull.

MS. CESARIO: Cheryl Cesario, State's Attorney, on behalf of the State.

THE COURT: We're all here pursuant to direction of the appellate court for us to review what we had done earlier.

Everyone has filed their purported findings of fact and conclusions of law, suggested orders, and also objections to findings of fact, on behalf of the Defendants, objecting to certain things that the State has written.

Of course, each side has editorialized the facts just a little bit in favor of their particular positions.

Now, if you want me to, I can recite the [4] facts as I perceive them, or we can let the record stand for itself.

I don't know if this is going back on appeal after what we do here today.

But in any event my prior ruling was that Detective McNulty entered the premises upon which Mr. Krull was the manager of the apartment, or at that time, I think

it was—he was licensed to Mr. Lucas. He was licensed to Mr. Lucas. He was on the premises pursuant to the authority provided him in the Illinois Motor Vehicle Code of Section 5-401(e), which said these officers can go on the premises to inspect the records at any time, day or night. And then they had the authority to verify the accuracy of the records required to be kept pursuant to another section, and rules of the Secretary of State.

That's the reason Officer McNulty was there.

He did indicate he saw four or five cars attached to various tow trucks being pulled in there, apparently they were being purchased by Mr. Krull; but he knew nothing about those tow trucks. Strike that.

He knew nothing about the status of the vehicles that were being directed onto the premises. [5] He was there to conduct an inspection, a license check pursuant to authority granted by the statute, and he asked for the required records, which is commonly known as the police book, which could not be produced at that time. However, Mr. Krull had taken down some notes of vehicles that he had purchased. And it was based on these records then that Detective McNulty conducted his search. I wouldn't call it a search, but a verification.

Had he only verified the four or five vehicles that were indicated on this particular sheet of paper, I think he would have been within his statutory authority; because the statute says first you check the records, then you have the opportunity to verify the records are accurate. It's a two-step process. Now, he didn't do that.

He took those records, and then he said to Mr. Krull, may I look around.

If you recall, my prior finding was that that was not a consent search. Because Mr. Krull, I'm sure being in the business, was aware of the officer's authority under the statute, that he had, if you want to call it, the right,

or at least the ability to go in there and look around in a certain described manner.

[6] So, Mr. Krull really didn't give him consent. He did not give him consent.

MR. MIQUELON: I don't mean to interrupt Your Honor, but I want to get the names straight. Krull was the licensee, Lucas was the guy on the premises.

THE COURT: Reverse that. It is Mr. Lucas on the premises that were purchasing the cars and operating the business. Mr. Krull was really the licensee. I'm sorry.

It was my original finding that Mr. Lucas merely acquiesced, because he had no choice but to allow the officer to look around.

There was no warrant adhered by any officer on the premises, and there was no probable cause based on the facts that I have read, and that I remember from the transcript. There was no probable cause for any of the officers to believe a crime was being committed, or in fact had been committed.

So, we don't get into those kind of situations. The officers were there pursuant to authority granted by a statute. That statute was declared unconstitutional. I don't remember the citation, Bionic Auto Parts and Sales. Fahner-518 Federal supplement 582, decided by Judge Schader, who in his [7] ruling, and that is attached to many of the documents supplied here, went through why that particular statute is unconstitutional.

My original ruling then relying upon that declaration said all of the evidence collected that day should be suppressed.

The appellate court reviewed Judge Schader's ruling, but in the interim—

MR. GARIPPO: You mean the Court of Appeals?

THE COURT: Federal Circuit Court of Appeals reviewed that. And in the interim the statute that was declared unconstitutional had been amended. It had been amended by adding section 5-100-1, 5-403, which in effect Judge Schader told the State they could do based on the decision in deciding the case of Donovan; where you have a particular public interest and the legislature regulating a business, the Appellate Court said that we should review our ruling based on the Circuit Court decision, that's the first issue.

Was the statute unconstitutional, and is it now?

I think our Appellate Court misread the Circuit Court's ruling. They didn't reverse Judge Schader on his ruling of constitutionality— [8] of really the unconstitutionality of that particular section 5-401(e), but they had, and they reversed, because they found no need for injunctive relief.

That's the whole point.

And they specifically declined to address themself to the constitutionality of section 5-401(e) as it stood before the new sections were added.

All the legislature did was bring our statute in conformity with requirements of the Donovan Case.

And I believe that because this act occurred prior to any additional legislation, and also relying on Judge Schader's ruling that the statute, was at the time Detective McNulty was on the premises, was unconstitutional, and remains so by itself disregarding the fact that it has now been amended. Because these amendments had then spelled out what is the reasonable process of inspection of those premises.

MR. GARIPPO: I hate to interrupt, but so we are following the Court, the Court then is adopting the reasoning of Judge Schader in finding the original statute unconstitutional?

THE COURT: Yes, regardless of any subsequent amendments that have been made. Because the Circuit [9] Court of Appeals said, of course as you know any appellate court

is reluctant to determine an issue of constitutionality if they don't have to. In this case they didn't have to, because the remedy had been supplied by the legislature. So, it's very possible that now section 5-401(e) standing along with the new sections is constitutional, but it wasn't at the time that Officer McNulty was on the premises, and what this case revolves around.

So, my original ruling that this particular section is unconstitutional will stand.

The next issue we have to address directed by the Appellate Court as a result of the Gates' Case, Illinois versus Gates, which talks about the model case of the federal exclusionary rule based on good faith exceptions with the officer acting in good faith, even though his conduct may be in violation of the Fourth Amendment would still allow the evidence to be admissible. The Gates Case is really more related to the Aguilar Case, and the two prong test of whether a warrant or complaint for a warrant is valid, because it deals with an anonymous tip that the officer had that they used to get a search warrant. And Aguilar requires before you could get a search warrant, you have to [10] allege the reliability of the informant, that this person was credible, that there had been information received by the police officers before to indicate what the man was saying to the officers would be sufficient to support a warrant. We don't have that problem here. We don't have a warrant.

So, I don't believe, as brought out in the conclusions of law filed on behalf of the Defendants, that that's an entirely different issue, is not applicable to this particular case.

I think that what the Appellate Court wants me to do, to look at that; we're not dealing with the Gates Case here. The Officers went in relying on the authority granted to them pursuant to a statute. That statute has

now been held unconstitutional. It was unconstitutional at the time, and absent the amendments by the legislature it would still be unconstitutional.

I think that takes care of the two major considerations that was sent back to us by the Appellate Court.

The third one is the standing of Mr. Mucerino. Apparently, he was not originally on the premises at the time the officers entered, but arrived later on, and he was arrested at that time.

[11] Now, this is somewhat unique, because the case cited by the State, which is the Trakas Case, Trakas versus Illinois, somewhat did away with standing, and indicated a new approach to suppression of evidence dealing with whether or not a particular individual had an expectation of the right of privacy in the area that was searched. They also said it had to be raised as almost an affirmative defense on the part of the person seeking to have the evidence suppressed.

But those issues, or that particular issue in Trakas was pursuant to the officer's reasonable belief that a crime had been committed. We're talking about probable cause at this particular point, and in the facts given in our case, there is no probable cause involved. The officers were there strictly in the performance of their duties as almost regulatory officers. They were there to look over the place, and check it out; and it's been determined that they did what they couldn't do, or shouldn't have done.

So, I'm going to have to accept the defendant's premise that we're not dealing with a Fourth Amendment violation, we're dealing with a due process violation.

The Officer in doing what he did, shouldn't [12] have done. And I think anybody on the premises who was subject to any police act should be protected.

Therefore, my original ruling that the motion to suppress should be sustained is reaffirmed.

That's where we stand.

Does anybody want to say anything else?

MS. CESARIO: No.

MR. GARIPPO: No.

THE COURT: Now, what's the State's position on this? I have to enter some sort of definitive order.

MS. CESARIO: Can we have a two week date to see if we're going to appeal it?

THE COURT: I'll enter an order that states that.

We'll have to enter an order that says that my order sustaining the motion to suppress of September 25th, 1981, is sustained again, I guess.

MS. CESARIO: Right. That you accept the Defendants' version all the way down the line?

THE COURT: There are some editorial comments in the recitation of facts, as there are in yours.

I would just as soon let my recitation stand as the finding of this Court based on the law [13] that's been cited. We are still dealing with an unconstitutional statute, regardless of the amendment. Anything that was collected pursuant to that search should be suppressed.

MS. CESARIO: We ask for a two week date, your Honor.

THE COURT: Do you need a little more time to review that?

MS. CESARIO: No, I think that will do.

MR. GARIPPO: With respect to your order then, it's your finding, I believe and help me if I'm wrong, that the issue of good faith is irrelevant here?

THE COURT: Yes.

MR. GARIPPO: Fine.

THE COURT: That's the way I see it, because in the Gates case they were discussing an exception really to the Aguilar requirement.

They're talking about a warrant that was secured based on an anonymous tip to police officers; even though, those anonymous tips proved to be an omen of events to occur, based on the fact they were told certain things would occur, certain things did. They went before a judge and got a warrant issued. We don't have a warrant situation here.

[14] We are dealing strictly with entry onto a premises pursuant to a statute which is unconstitutional. Therefore, I don't think the Gates case is relevant.

MR. GARIPPO: Okay, what is the date you're setting?

THE COURT: She would like to have two weeks.

MS. CESARIO: July 23rd?

THE COURT: Okay.

MR. GARIPPO: Same time, two o'clock?

THE COURT: Yes, that will be fine.

MR. OBBISH: Thank you.

MR. GARIPPO: Thank you.

MR. MIQUELON: Thank you.

MS. CESARIO: Thank you.

[15] Certificate of Official Court Reporter omitted in printing.

Ill. Rev. Stat. 1979, Ch. 95½, Sec. 5-401

5-401. Licensees required to keep records

§ 5-401. Licensees required to keep records. (a) Every person licensed under Chapter 5 of this Act shall maintain for 3 years, in such form as the Secretary of State may by rule or regulation prescribe, at his principal place of business a record of:

1. Every new or used vehicle, used parts or accessories, body, or engine of or for such vehicle purchased, received, or acquired by him, a description of every said vehicle part or accessory including numbers of or other marks of identification, if any, together with the date and the names and addresses of the person from whom each such vehicle, part or accessory was purchased, received or acquired. In the case of a motor vehicle, such description shall also include the trade name, the name of the maker, type, engine and serial number and vehicle identification number in lieu of the engine and serial number and other distinguishing marks, and whether any number thereon have been defaced, destroyed or changed;

2. Every new or used vehicle, body, chassis or engine of or for such motor vehicle sold, exchanged, or disposed of by him, including numbers of or other marks of identification, if any, together with the date and the names and addresses of the persons to whom each vehicle was sold, exchanged, or disposed of by him. In the case of motor vehicle, such description shall also include the trade name, the name of the maker, type, engine and serial number and vehicle identification number in lieu of the engine and serial number and other distinguishing marks and whether any numbers thereon have been defaced, destroyed or changed;

3. Every vehicle wrecked, dismantled or rebuilt by him and the date of its wrecking, dismantling or rebuilding;

(b) Every licensee shall have in his possession a separate certificate of title assigned to him or other documentary evidence of his right to possession of and for every vehicle, part or accessory in his possession.

(c) Every licensee shall have in his possession a separate salvage certificate issued to him as evidence of his right to possession of any vehicle in his possession.

(d) Every person licensed as a transporter under Chapter 5 of this Act shall maintain for 3 years in such form as the Secretary of State may by rule or regulation prescribe at his principal place of business a record of every vehicle transported by him, including numbers of or other marks of identification thereof, the names and addresses of the persons from whom and to whom such vehicle was delivered and the dates thereof.

(e) Every record required to be maintained under this Section shall be opened to inspection by the Secretary of State or his authorized representative or any peace officer for inspection at any reasonable time during the night or day. Such inspection may include examination of the premises of the licensee's established place of business for the purpose of determining the accuracy of required records.

Amended by P.A. 78-858, § 1, eff. Jan. 1, 1974; P.A. 78-1205, § 1, eff. Sept. 5, 1974; P.A. 78-1297, § 58, eff. March 4, 1975; P.A. 81-908, § 1, eff. Sept. 22, 1979; P.A. 81-932, § 1, eff. Sept. 22, 1979.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ALBERT G. KRULL and ACTION, IRON & METAL, INC., an Illinois Corporation, *Plaintiffs,*

No. 81 C 4907 v.

TYRONE FAHNER, ATTORNEY GENERAL OF ILLINOIS, JIM EDGAR, SECRETARY OF STATE OF ILLINOIS, RICHARD M. DALEY, STATES ATTORNEY OF COOK COUNTY, ILLINOIS, RICHARD BRZECZEK, SUPERINTENDENT OF THE CITY OF CHICAGO, ILLINOIS, *Defendants.*

STIPULATION

It is hereby stipulated by and between the Plaintiffs, ACTION, IRON & METAL, INC. and ALBERT G. KRULL, by their respective attorneys, Louis B. Garippo and Miriam F. Miquelon, and the Defendant, RICHARD M. DALEY, States Attorney of Cook County, Illinois, by his attorney Elizabeth Cohen, Assistant State's Attorney, that:

1. Plaintiff, Action, Iron & Metal, Inc., is a corporation licensed to do business in the State of Illinois and has its principal place of business in the State of Illinois. (A true and correct copy of Plaintiff's license is attached as Exhibit A).

2. Plaintiff, Action, Iron & Metal, Inc., is licensed by the State of Illinois, pursuant to Chapter 95½, Section 5-301 (Ill. Rev. Stat., 1979) to engage in the business of acquiring, wrecking, recycling, rebuilding and selling automotive parts.

3. Plaintiff, Albert G. Krull, is a duly authorized agent of Plaintiff, Action, Iron & Metal, Inc.

4. The Defendant, Secretary of State, promulgated Rule 5-401(a) pursuant to the enactment of Chapter 95½, Section 5-401(e), Ill. Rev. Stat., 1979.

5. The licensee has been subjected to administrative searches pursuant to Chapter 95½, Section 5-401(e) and Rule 5-401(a) on several occasions in or about July, 1981. The searches were conducted without warrant or other legal process and without probable cause. If any form of consent was given by Plaintiffs or their agents permitting entry on to the business premises to conduct the aforementioned searches, such consent was predicated upon Plaintiffs' belief that the statutory authority contained in Chapter 95½, Section 5-401 et seq., declared unconstitutional in *Bionic v. Fahner,* No. 80 C 3696, authorized Defendants' or their agents to conduct the above-described searches and seizures.

6. Plaintiffs did not receive any prior notification, either written or oral, regarding the Defendants' or their agents' intentions to enter the business premises on the aforementioned dates.

7. On or about July 20, 1981, Plaintiff, Krull was arrested by agents of the Defendant, Richard Brzeczek. Plaintiff, Krull's arrest directly resulted from the seizure of certain vehicular equipment on July 5, 1981, by agents of the Defendant, Brzeczek during a search conducted pursuant to Chapter 95½, Section 5-401 et seq.

8. Plaintiffs waive their right to demand attorney fees and costs for the preparation and trial of this case at the District Court level only.

9. Plaintiffs are seeking declaratory and injunctive relief only.

Respectfully submitted,

/s/ Louis B. Garippo
Attorney for Plaintiff,
Action, Iron & Metal, Inc.

/s/ Miriam F. Miquelon,
Attorney for Plaintiff,
Albert G. Krull

(3)

No. 85-608

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE STATE OF ILLINOIS,

Petitioner,

vs.

ALBERT KRULL, et al.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Illinois

PETITIONER'S BRIEF ON THE MERITS

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PETITION FOR WRIT OF CERTIORARI FILED SEPTEMBER 16, 1985
CERTIORARI GRANTED MARCH 24, 1986

28pp

QUESTION PRESENTED

Whether the exclusionary rule was properly invoked in the lower court where the predicate search was authorized by a presumptively valid statute only later found to violate the fourth amendment.

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In The

Supreme Court of the United States

October Term, 1985

THE STATE OF ILLINOIS,

Petitioner,

vs.

ALBERT KRULL, et al.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Illinois

PETITIONER'S BRIEF ON THE MERITS

OPINIONS BELOW

The opinion of the Illinois Supreme Court presented for review is set forth in the appendix of the Petition for a Writ of Certiorari and reported at *People v. Krull*, 107 Ill. 2d 107, 481 N.E.2d 703 (1985). The unreported November 23, 1983, Order of the Appellate Court of Illinois, First Judicial District, is set forth in the Joint Appendix at pages 22-26. The Report of Proceedings containing the trial court's findings on September 25, 1981, and July 9, 1984, is reproduced at pages 18-21 and pages 27-35 of the Joint Appendix.

JURISDICTION

The opinion of the Illinois Supreme Court was filed on July 17, 1985 and the Petition for a Writ of Certiorari submitted September 16, 1985. The petition was granted by this Court on March 24, 1986. Jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

STATUTES INVOLVED

United States Constitution, Amendment IV:

> The right of the People to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.

The text of Illinois Revised Statute, Chapter 95½, Section 5-401 (1979), is set forth in its entirety at pages 36-37 of the Joint Appendix.

STATEMENT OF THE CASE

Complaints filed on July 5, 1981, in the Circuit Court of Cook County, Illinois, charged respondent Salvatore Mucerino with one count of possession of a stolen vehicle (J.A. 2) and respondent George Lucas with three counts of possession of a stolen vehicle and one count of possession of a false manufacturer's identification number. (J.A. 9-12) Complaints filed on July 20, 1981, charged respondent Albert Krull with six counts of failure to surrender a certificate of title. (J.A. 3-8)

The facts underlying all charges arose on July 5, 1981, when Detective Leilan K. McNally of the Chicago Police Department made a warrantless entry onto the business premises of the Action Iron and Metal Company for the purpose of performing a records inspection authorized by section 5-401(e) of the Illinois Vehicle Code.[1] The following day, in an unrelated action for injunctive relief filed pursuant to 42 U.S.C. § 1983, the Honorable Milton I. Shadur of the United States District Court for the Northern District of Illinois held that the statute's authorization of searches "at any reasonable time during the night or day" does not sufficiently circumscribe official discretion as to when and whom to search. *Bionic Auto Parts and Sales, Inc. v. Fahner*, 518 F. Supp. 582 (N.D. Ill.

[1] Section 5-401(e) provided:

> (e) Every record required to be maintained under this Section shall be opened to inspection by the Secretary of State or his authorized representative or any peace officer for inspection at any reasonable time during the night or day. Such inspection may include examination of the premises of the licensee's established place of business for the purpose of determining the accuracy of required records.

Ill. Rev. Stat., ch. 95½, § 5-401(e) (1979) (J.A. 37).

1981). Respondents subsequently filed a motion to suppress evidence based upon this decision. (J.A. 13-17)

At a hearing on the motion before the Honorable Martin F. Hogan, Detective McNally testified that at approximately 10:30 a.m. July 5, 1981, he made a warrantless inspection of the Action Iron and Metal Company's premises as part of his regular inspection duties carried out pursuant to section 5-401(e). (R. 12-14, 18, 24)[2] When he arrived at the scrap yard, the officer noticed tow trucks delivering wrecked vehicles which were purchased by respondent Lucas. McNally identified himself to Lucas as a police officer and asked if the yard was open for business. Lucas replied affirmatively and stated that he was in charge. (R. 21, 25) McNally requested that he be allowed to inspect the company's license and records contained in what is commonly known as the police book. (R. 26) Lucas responded that he could not locate the documents but did produce a yellow pad of paper describing five vehicles which he had purchased. (R. 17, 26)

McNally asked Lucas if he objected to the officer's inspection of vehicles in the yard, to which respondent replied "Go right ahead." (R. 26) McNally proceeded to make a notation of the serial number on all the vehicles he was able to examine. (R. 12, 26) He then checked those serial numbers on his mobile computer and discovered that three of the vehicles had been reported stolen. (R. 11, 12) These vehicles were seized, along with another that had the vehicle identification tag removed. (R. 11)

Lucas was arrested on the scene. (R. 16, 19) Although respondent Mucerino was also present, he was not arrested until some time later. (R. 18, 19) Respondent Krull,

[2] "R." designates the Report of Proceedings held September 25, 1981, on respondents' Motion to Suppress Evidence Illegally Seized.

a licensee of the corporation, was not present on July 5 and could not be located. (R. 10, 11, 17, 18) Pursuant to McNally's request, Krull's attorney later tendered to the officer all the company's pertinent records. (R. 10)

The trial court ruled that respondent Mucerino had standing to object to Detective McNally's search and that respondent Lucas had not given effective consent to search. (J.A. 19, 20) The court further found the inspection to be permissible activity under the statute, but granted the motion to suppress because section 5-401(e) had been declared unconstitutional. (J.A. 20, 21) On the People's appeal to the Appellate Court of Illinois, First Judicial District, the court vacated Judge Hogan's order and remanded the case in light of *Illinois v. Gates*, 462 U.S. 213 (1983), for a determination of whether the search of the scrap yard was conducted in good faith. Because section 5-401(e) had since been amended by the Illinois legislature and portions of Judge Shadur's order in *Bionic* were therefore vacated as moot by the seventh circuit [*Bionic Auto Parts and Sales, Inc. v. Fahner*, 721 F.2d 1072 (7th Cir. 1983)], the court also suggested that Judge Hogan reconsider whether the prior statute was constitutional and whether respondent Mucerino had standing to contest the search. *People v. Krull*, Nos. 81-2621, 81-2622, 81-2623 consol. (1st Dist. Nov. 23, 1983). (J.A. 22-26)

On remand, Judge Hogan reiterated his previous findings that respondent Lucas did not consent to the search, that respondent Mucerino had standing, and that for the reasons stated by the district court in *Bionic*, section 5-401(e) was unconstitutional before being amended. (J.A. 30, 32, 33) On the issue "directed by the Appellate Court as a result of the Gates' Case", the trial court found *Gates* and its discussion of the good faith exception to the exclusionary rule to be irrelevant in the context of warrantless

searches conducted pursuant to statute. (J.A. 32, 34, 35) Accordingly, the original ruling on respondents' motion to suppress remained intact. (J.A. 33)

Judge Hogan's order was affirmed on the People's direct appeal to the Illinois Supreme Court, which held that respondent Lucas did not consent to the search, that good faith reliance on a procedural statute will not cure an otherwise illegal search, and that prior to being amended section 5-401(e) was unconstitutional for the reasons stated by the district court in *Bionic. People v. Krull*, 107 Ill. 2d 107, 481 N.E.2d 703 (1985). Petitioner obtained *certiorari* review of that decision on March 24, 1986.

SUMMARY OF ARGUMENT

A. In *United States v. Leon*, ___ U.S. ___, 104 S.Ct. 3405 (1984), this Court for the first time recognized a good faith exception to the fourth amendment exclusionary rule, holding that there exists insufficient justification for the suppression of reliable evidence in the prosecution's case-in-chief when an arrest or search was effectuated by law enforcement in objectively reasonable reliance on a subsequently invalidated warrant. Adhering to the reasoning of *Leon*, a good faith exception should also be recognized when police have acted in reasonable reliance on a statute later declared invalid under the fourth amendment. The enactments of state and federal legislatures are presumptively constitutional; officers charged with enforcement of the laws cannot ordinarily be expected to question their validity any more than officers can be expected to question the validity of a duly issued warrant. Particularly where searches or seizures are reasonably conducted pur-

suant to a statute or warrant, the primary purpose of the exclusionary rule, to deter police misconduct, would not be significantly advanced by the costly use of the suppression sanction. Nor will the exclusionary rule's rationale support an attempt to deter legislatures from enacting unconstitutional statutes. These bodies are guarantors of the people's liberty to the same degree as the courts. Adequate incentive to comply with the fourth amendment further exists through serious practical consequences attending the invalidation of a statute independent of evidentiary exclusion.

B. The warrantless inspection of respondent Krull's premises was authorized by a state statute regulating the licensed industry of automotive parts and scrap processors, which Illinois had long subjected to extensive scrutiny. Neither the statute nor its predecessor enacted in the 1930s had been held invalid at the time of the search. Although a federal district court judge later declared the statute in violation of the fourth amendment, even members of the judiciary would appear to be in conflict over the correctness of that ruling. Under these circumstances, there existed no significant reason for the police to question the presumptive validity of the statute when respondent Krull's premises were inspected. Because law enforcement acted in good faith, the exclusionary rule was improperly invoked by the lower court.

ARGUMENT

THE EXCLUSIONARY RULE WAS IMPROPERLY INVOKED IN THE LOWER COURT WHERE THE PREDICATE SEARCH WAS AUTHORIZED BY A PRESUMPTIVELY VALID STATUTE ONLY LATER FOUND TO VIOLATE THE FOURTH AMENDMENT.

Pursuant to a long-standing Illinois statute authorizing the warrantless administrative inspection of business premises occupied by licensed used automobile and parts dealers, a detective of the Chicago Police Department perused inventory of the Action Iron and Metal Company owned by respondent Krull. Although the regulatory statute was subsequently held to violate the fourth amendment, at the time of the inspection there existed no significant reason for the detective to question its validity. Under these circumstances, this Court's decision in *United States v. Leon*, ____ U.S. ____, 104 S.Ct. 3405 (1984), mandates the conclusion that application of the exclusionary rule below was not justified.

A.

Application Of The Exclusionary Rule Is Unwarranted Where A Search Or Seizure Was Conducted In Reasonable Reliance On A Statute Subsequently Ruled Invalid Under The Fourth Amendment.

In *Leon* and its companion case *Massachusetts v. Sheppard*, ____ U.S. ____, 104 S.Ct. 3424 (1984), this Court for the first time recognized a good faith exception to the fourth amendment exclusionary rule, holding that evaluation of the societal costs and benefits in suppressing reliable evidence dictates that the sanction not be applied during the prosecution's case-in-chief where an arrest or a search was effectuated by law enforcement in objectively

reasonable reliance on a subsequently invalidated warrant. Rejection of suppression as an appropriate remedy to enforce fourth amendment rights is even more compelling where a search or seizure was conducted in good faith pursuant to a presumptively valid statute later declared unconstitutional.

It is well-established that the exclusionary rule operates as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the person aggrieved." *United States v. Calandra*, 414 U.S. 338, 348 (1974). This Court has also recognized that through its interference with the fact-finder's truth seeking function, the rule may operate to ameliorate or nullify the adverse consequences of criminal conduct and thereby "generat[e] disrespect for the law and administration of justice." *Stone v. Powell*, 428 U.S. 465, 490, 491 (1976). Accordingly, invocation of the rule had not been required merely because suppression in a particular context incrementally contributes to its deterrent function. *See, e.g., United States v. Janis*, 428 U.S. 433, 454 (1976) (use in federal civil proceedings of evidence illegally seized by state officials). Rather, "[a]s with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought *most efficaciously* served." *Calandra*, 414 U.S. at 348 (emphasis supplied).

To ascertain the potential benefits served by application of the exclusionary rule where warrants have been secured, *Leon* focused on the sanction's effect on the behavior of individual law enforcement officers or on the policies of their departments. 104 S.Ct. at 3419. In discounting any influence the suppression of evidence may have on judges or magistrates issuing warrants, this Court reasoned that (1) the primary purpose of the exclusion-

ary rule is to deter police misconduct rather than to punish judicial error, (2) no evidence suggests that judges and magistrates are inclined to ignore or subvert the fourth amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion, and (3) there exists no basis for believing that use of the rule will have any significant effect on a neutral judicial officer's decision to issue a warrant. *Id.* at 3418. Each of these considerations applies with equal if not greater force in the context of searches or seizures conducted pursuant to duly enacted state or federal legislation.

The primary purpose of the exclusionary rule is not to punish legislative error, nor is the reckless enactment of unconstitutional statutes "a problem of major proportions." *Id.* at 3418, n.14. Any contrary suggestion would fly in the face of this Court's repeated pronouncements that, particularly where the validity of a statute turns on what is "reasonable" under the fourth amendment, the collective judgment of legislators on the issue is entitled to a strong presumption of constitutionality. *See United States v. Di Re*, 332 U.S. 581, 585 (1948); *United States v. Watson*, 423 U.S. 411, 416 (1976); *Marshall v. Barlow's, Inc.*, 429 U.S. 1347, 1348 (1977) (Rehnquist, J., in chambers). *Cf. Payton v. New York*, 445 U.S. 573, 600 (1980) (while a long-standing, widespread practice is not immune from fourth amendment scrutiny, it is not to be lightly brushed aside, particularly "when the constitutional standard is as amorphous as the word 'reasonable', and when custom and contemporary norms necessarily play such a large role in the constitutional analysis."). This Court's willingness to place weight on legislative determinations of reasonableness when resolving substantive fourth amendment issues clearly implies a rejection of any notion that legislatures tend to undermine fourth amendment principles so as to necessitate the use of costly sanctions

such as evidentiary suppression. Indeed, common sense dictates that errant judicial behavior on the part of a single judge or magistrate will occur with more frequency than the enactment of misconceived statutes hammered out by entire legislative bodies which are "ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Maher v. Roe*, 432 U.S. 464, 480 (1977) [quoting *Missouri K & T.R. C. v. May*, 194 U.S. 267, 270 (1904) (Holmes, J.)].

Nor is there any reason to believe that exclusion of evidence seized pursuant to statute will have a significant deterrent effect on the enactment of legislation contravening the fourth amendment. While the legislative branch might be viewed as more closely aligned with law enforcement than the judiciary, incentive to enact valid laws nevertheless will not arise from the potential exclusion of evidence in particular criminal proceeding. Rather, a legislature's incentive exists in the knowledge that should its statute fail to survive judicial scrutiny,[3] not only will

[3] In *Leon*, this Court observed that reviewing courts have the authority to resolve fourth amendment questions on their merits before turning to considerations of good faith and that it is not likely litigants will be significantly deterred from presenting colorable claims by application of the good faith exception. 104 S.Ct. at 3422, 3423. Particularly in the context of single industry regulatory statutes such as that at issue here (*see* Argument B, *infra*), there is no danger that their constitutionality will become immune from attack. While the search or seizure made pursuant to an individual warrant will typically not be repeated, searches authorized in pervasively regulated industries will by definition occur more frequently and businesses subjected to those searches will likely have the incentive and financial ability to seek declaratory or injunctive relief as did the association of auto yards in *Bionic Auto Parts and Sales, Inc. v. Fahner*, 518 F. Supp. 582 (N.D. Ill. 1981). Therefore, even more unpersuasive than in *Leon* are the arguments that recognition of a good faith exception "will preclude review of the constitutionality of the search or seizure, deny needed guidance from the courts, or freeze Fourth Amendment law in its present state." 104 S.Ct. at 3422.

the condemnation of its actions be highly visible independent of the particular case under review, but the laborious process of legislative creation must begin anew. Although it has been suggested that adoption of a good faith exception will affect the diligence of magistrates issuing warrants, it is not even arguable that a legislature's duty to enact constitutional statutes will come to be perceived by that body as an "inconsequential chore." *Leon*, 104 S.Ct. at 3444 (Brennan, J., dissenting). Therefore, "[i]f exclusion of evidence obtained pursuant to a subsequently invalidated [statute] is to have any deterrent effect, . . . it must alter the behavior of law enforcement officers or the policies of their departments." *Id.* at 3419.

In *United States v. Peltier*, 422 U.S. 531 (1975), this Court held that the policies underlying the exclusionary rule did not warrant retroactive application of its fourth amendment holding in *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973). The Court reasoned first that the deterrent purpose of the rule "necessarily assumes that the police have engaged in willful, or at the very least negligent," unconstitutional conduct. 422 U.S. at 539 [quoting *Michigan v. Tucker*, 417 U.S. 433, 447 (1974)]. Accordingly, evidence obtained from an invalid search should be suppressed "only if it can be said that the law enforcement officer had knowledge, or may be properly charged with knowledge," that the search violated the fourth amendment. *Id.* at 542. Second, because the search at issue had been conducted pursuant to long-standing statutory and regulatory authority which had been repeatedly upheld against constitutional attack by the lower courts, law enforcement could not be charged with knowledge of its invalidity. *Id.*

While the fourth amendment retroactivity analysis of *Peltier* appears to have since been modified by this

Court,[4] its suggestion that the exclusionary rule should not be applied to deter objectively reasonable police conduct was reiterated in *Leon*, which found that application of a good faith exception in warrant cases is particularly appropriate because it is the magistrate's responsibility to issue a warrant comporting with the fourth amendment. 104 S.Ct. at 3419, 3420.

Just as in "the ordinary case" an officer cannot be expected to question the propriety of a duly issued warrant (*id.* at 3420), an officer should not generally be required to second-guess the validity of statutes which have been enacted by legislative bodies acting as co-guarantors of the people's liberty. *See* pp. 10, 11 *supra*. As recognized by this Court in *Michigan v. De Fillippo*, 443 U.S. 31 (1979),

> Police are charged to enforce laws until and unless they are declared unconstitutional. The enactment of a law forecloses speculation by enforcement officers concerning its constitutionality—with the possible exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws. Society would be ill-served if its police officers took it upon themselves to deter-

[4] *Peltier* relied almost exclusively on the policies underlying the exclusionary rule in determining that *Almeida-Sanchez* should not be applied retroactively. 422 U.S. at 535. In *United States v. Johnson*, 457 U.S. 537 (1982), this Court deemphasized consideration of the purpose of a particular constitutional rule and to a great extent embraced Justice Harlan's dissenting opinion in *Desist v. United States*, 394 U.S. 244 (1969), which expressed the view that the Court should strive to formulate retroactivity principles of general applicability, to decide all cases before it in accord with existing constitutional standards, and to treat similarly situated defendants similarly. *Desist*, 394 U.S. at 258, 259. *Johnson* therefore concluded that unless a case is clearly controlled by prior retroactivity precedent, a decision of the Court construing the fourth amendment (at issue there) is to be applied retroactively to all convictions not yet final at the time the decision was rendered. 457 U.S. at 562.

mine which laws are and which are not constitutionally entitled to enforcement.

Id. at 38.

De Fillippo held that where an arrest is made in reasonable reliance on a substantive criminal statute later declared unconstitutional, the fourth amendment is not offended. In finding the decision's consideration of good faith inappropriate to the case at bar, the Illinois Supreme Court correctly noted that *De Fillippo* specifically distinguished between intrusions conducted pursuant to substantive statutes and those effectuated under color of a procedural statute directly authorizing the arrest or search. *People v. Krull*, 107 Ill. 2d 107, 118, 481 N.E.2d 703, 708 (1985). Regardless of the validity of that distinction, however, the lower court failed to recognize the more significant and reasoned distinction later made manifest in *Leon* between substantive fourth amendment decisions and those wherein the applicability of the exclusionary rule as a proper remedy is in issue. *See Leon*, 104 S.Ct. at 3415, n.8. As *Leon* teaches, resolution of the latter question depends solely upon the rule's potential for deterrence in a given context, and *De Fillippo* speaks directly to this point: "To deter police from enforcing a presumptively valid statute was never remotely in the contemplation of even the most zealous advocate of the exclusionary rule." 443 U.S. at 39, n.3.

B.

The Inspection Of Respondent Krull's Premises, Authorized By A Long-Standing State Statute Which Existing Law Did Not Clearly Establish To Be Invalid, Was Conducted In Good Faith.

The criminal charges brought against respondents are predicated upon the July 5, 1981, warrantless entry onto

the business premises of the Action Iron and Metal Company by Detective Leilan K. McNally of the Chicago Police Department. The entry was made pursuant to section 5-401(e) of the Illinois Vehicle Code, which provided:

> (e) Every record required to be maintained under this Section shall be opened to inspection by the Secretary of State or his authorized representative or any peace officer for inspection at any reasonable time during the night or day. Such inspection may include examination of the premises of the licensee's established place of business for the purpose of determining the accuracy of required records.

Ill. Rev. Stat., ch. 95½, § 5-401(e) (1979) (J.A. 37).[5]

[5] The trial court initially held that Detective McNally's inspection of the premises was "permissible activity" in accord with the statute (J.A. 20), but later intimated that the search exceeded statutory authority because the detective did not limit his inspection to verifying the accuracy of the only "record" provided him by respondent Lucas at the time, a pad of paper upon which five vehicles were described. (J.A. 29) Inasmuch as all pertinent records of the company were later tendered to McNally at his office by respondent Krull's attorney (R. 10), the trial court apparently questioned whether under the statute the premises search could precede scrutiny of the police book required by section 5-401 to be maintained and made available for inspection at the principal place of business. However, as recognized by the seventh circuit in *Bionic Auto Parts and Sales, Inc. v. Fahner*, 721 F.2d 1072 (7th Cir. 1983), if the regulatory inspections authorized by the Illinois Vehicle Code are to be credible deterrent, the inspections must be unannounced. *Id.* at 1078. *Cf. Donovan v. Dewey*, 452 U.S. 594, 603 (1981) (Mine Safety and Health Act); *United States v. Biswell*, 406 U.S. 311, 316 (1972) (Gun Control Act). This deterrent function would be rendered ineffective if licensees could preclude immediate premises searches by the simple expedient of failing to tender all existing records at the time they are requested. Had the Illinois Supreme Court not agreed, it would have declined to address the constitutionality of section 5-401(e) particularly where the legislation had since been amended. *See Lindberg v. Zoning Board of Appeals*, 8 Ill. 2d 254, 133 N.E.2d 266 (1956).

The following day, in an unrelated action for injunctive relief filed pursuant to 42 U.S.C. § 1983, the Honorable Milton I. Shadur of the United States District Court for the Northern District of Illinois held section 5-401(e) to violate the fourth amendment. *Bionic Auto Parts and Sales, Inc. v. Fahner*, 518 F. Supp. 582 (N.D. Ill. 1981). Judge Shadur agreed with state officials there that the nature of the used auto parts business in Illinois justifies regulation by statutes which might not be amenable to effective enforcement if impromptu warrantless searches were not authorized. Accordingly, the fourth amendment does not preclude such inspections where " 'the statute's inspection program, in terms of the certainty and regularity of its application, provides a constitutionally adequate substitute for a warrant.' " *Id.* at 585 [quoting *Donovan v. Dewey*, 452 U.S. 594, 603 (1981)].

Judge Shadur then pointed out that the administrative scheme approved in *Dewey* "*required* inspection of *all* mines" pursuant to a specific schedule, whereas that struck down by this Court in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), merely authorized premises inspections at reasonable times. 518 F. Supp. at 585. The judge concluded that, as in *Barlow's*, the Illinois statute's authorization of searches "at any reasonable time during the night or day" did not sufficiently circumscribe official discretion as to when and whom to search. *Id.*[6]

[6] The Illinois Supreme Court agreed. *People v. Krull*, 107 Ill. 2d 107, 116, 481 N.E.2d 703, 707 (1985). Before the district court's ruling could be reviewed by the seventh circuit on appeal, the statute was amended to require that inspections be made "at any time that business is being conducted or work is being performed . . . or when the licensee or a representative of the licensee, other than a mere custodian or watchman, is present", that they not exceed 24 hours in length, and that they occur no more than six

(Footnote continued on following page)

Assuming the district court's ruling to have been correct, Detective McNally cannot be properly charged with knowledge that section 5-401(e) was constitutionally flawed. Before initiation of the present prosecution, the Illinois state courts had had only two occasions to address the reasonableness of searches directed at the premises of dealers licensed to buy and sell used motor vehicles or vehicle parts. In *People v. Levy*, 370 Ill. 82, 17 N.E.2d 967 (1938), and *People v. Allen*, 407 Ill. 596, 96 N.E.2d 446 (1950), the Illinois Supreme Court held the searches constitutional because the Uniform Motor Vehicle Anti-Theft Act then in effect specifically provided that dealers must maintain various records and, as a condition of licensing, "shall be deemed to have granted authority to any peace officer to examine such records, and any motor vehicle, or parts or accessories in his place of business at any reasonable time during the day or night." Ill. Rev. Stat., ch. 95½, § 87(a) (1937). This search provision is the predecessor to section 5-401(e). *Northern Illinois Automobile Wreckers and Rebuilders Ass'n v. Dixon*, 75 Ill. 2d 53, 387 N.E.2d 320 (1979).

Twenty years later in *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970), this Court found that because regulation of the liquor industry had strong historical roots, Congress held the power to make criminal a liquor licensee's failure to permit a warrantless inspection of his inventory. *Colonnade*'s emphasis on an industry's pervasive regulation was reiterated in *United States v. Biswell*, 406 U.S. 311 (1972), where legislation providing

[6] *continued*
times in any six-month period. Ill. Rev. Stat., ch. 95½, § 5-403(4), (5), and (7) (1983). The seventh circuit found these amendments to adequately limit the intrusiveness of the search and official discretion in its implementation. *Bionic Auto Parts and Sales, Inc. v. Fahner*, 721 F.2d 1072, 1080 (7th Cir. 1983).

for the warrantless inspection of premises upon which firearms are imported, manufactured, collected or dealt was ruled constitutional. In support of its determination that these administrative searches are not unreasonable under the fourth amendment, this Court reasoned that the searches furthered urgent governmental interests and that licensees choosing to engage in extensively regulated industries do so with the knowledge that their records and inventory will be subject to inspection. *Id.* at 315, 316. Significantly, neither the statute at issue in *Colonnade* [26 U.S.C. § 5146(b)] nor that addressed in *Biswell* [18 U.S.C. § 923(g)] mandated that inspections be made or circumscribed the timing of the searches other than to require that they be conducted "during business hours."

This Court's decision in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), appeared to characterize the reaffirmed *Colonnade-Biswell* exception to the warrant requirement as one based upon the effective consent granted by the entrepreneur in a particular industry as a result of its long history of governmental regulation. *Id.* at 312, 313. *See also id.* at 336-38 (Stevens, J., with whom Blackmun, J., and Rehnquist, J., join, dissenting). Subsequent to *Barlow's*, this or a similar rationale was held to support warrantless administrative searches in a variety of contexts.[7] However, in an opinion issued two weeks before

[7] *See, e.g., United States v. New England Grocers Supply Co.*, 488 F. Supp. 230 (D. Mass. 1980) (food industry); *United States v. Kaiyo Maru No. 53*, 503 F. Supp. 1075 (D. Alaska 1980) (commercial fishing industry); *People v. Firstenberg*, 92 Cal. App. 3d 570, 155 Cal. Rptr. 80 (1979) (nursing home industry); *State v. Barnett*, 389 So.2d 352 (La. 1980) (used property industry). None of the statutes addressed in these cases mandated inspection. Nor did they limit the timing of inspection other than to require that it be "reasonable." While the massage parlor inspection statute at issue in *Pollard v. Cockrell*, 578 F.2d 1002 (5th Cir. 1978), did

(Footnote continued on following page)

the search conducted by Detective McNally, this Court in *Donovan v. Dewey*, 452 U.S. 594, 603 (1981), clarified that the ultimate concern is the pervasiveness and regularity of the statutory scheme. *Id.* at 606. *See also id.* at 607 (Stevens, J., concurring).

As recognized by the seventh circuit in *Bionic*, it is undisputed that Illinois has long subjected the business of automotive parts and scrap processors to extensive scrutiny through licensing and other regulatory requirements. 721 F.2d at 1079. Further, the State has a strong interest in the prevention of stolen motor vehicle sales which is served by the Motor Vehicle Code's record-keeping provisions and its authorization of frequent, impromptu warrantless inspections for the purpose of verifying the accuracy of those records required to be maintained. *Id.* at 1077, 1078. It is therefore clear that prior to *Dewey* the Illinois statute was a candidate for automatic invocation of the *Colonnade-Biswell* exception.[8]

[7] *continued*
require that the premises be inspected "periodically", the fifth circuit's reliance upon *City of Indianapolis v. Wright*, 371 N.E.2d 1298 (Ind. 1978), suggests that the mandatory nature of the statute was not deemed material. Similarly, although inspections pursuant to New York's Vehicle Dismantlers Law may be conducted only during "usual business hours", the limitation was not noted by the court in *People v. Tinneny*, 99 Misc. 2d 962, 417 N.Y.S.2d 840 (1979), which instead looked to the facts of the specific case for a determination of reasonableness. *See also People v. Easley*, 90 Cal. App. 3d 440, 153 Cal. Rptr. 396 (1979) (vehicle dismantling industry).

[8] At the time of the search conducted here, at least five states had enacted statutes authorizing warrantless inspections directed at the used automobile and automotive parts industry which neither mandated nor limited the frequency or hours of inspection. *See* Ariz. Rev. Stat., § 28-1307(c) (1952); Colo. Rev. Stat., § 42-5-105(1) (1963); Del. Code, Title 21, § 6717 (Supp. 1977); Hawaii Rev. Stat., § 289-6 (1976); Tex. Veh. Code Ann., § 6687-2 (1977).

Even if Detective McNally may be charged with knowledge of so recent an opinion, perusal of *Dewey* does not compel a finding that section 5-401(e) contravenes the fourth amendment. While *Dewey* did emphasize the mandatory schedule statutorily imposed upon inspections conducted pursuant to section 103(a) of the Federal Mine Safety and Health Act, 30 U.S.C. § 813(a) (1976 ed., Supp. III), it did not suggest that the statutes at issue in *Colonnade* and *Biswell* were rendered unconstitutional because they did not require inspections at specified intervals. And while the statutes addressed in those cases did limit inspections to reasonable business hours, that upheld in *Dewey* placed no cap on the frequency of inspection, nor did it limit the hours of inspection. Under these circumstances, it was reasonable for peace officer McNally to believe that the Illinois statute's presumptive validity remained intact despite its failure to mandate inspections or circumscribe official discretion in determining the reasonableness of an inspection's frequency or hours. Indeed, even members of the post-*Dewey* judicial branch have expressly or impliedly refused to find these alleged inadequacies fatal to similar statutes authorizing the warrantless administrative search of business premises. *See, e.g., United States v. Jamieson-McKames Pharmaceuticals*, 651 F.2d 532 (8th Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982) [construing the Food, Drug and Cosmetic Act, 21 U.S.C. § 374(a)]; *United States v. Gel Spice Co.*, 601 F. Supp. 1214 (E.D.N.Y. 1985) (same); *Kim v. Dolch*, 219 Cal. Rptr. 248 (Cal. App. 4th Dist. 1985) (construing city ordinance regulating massage parlors); *Peterman v. Coleman*, 764 F.2d 1416 (11th Cir. 1985) (construing city ordinance regulating pawn brokers).

In *United States v. Leon*, ___ U.S. ___, 104 S.Ct. 3405, 3421, 3422 (1984), this Court noted that although reliance on a warrant will normally suffice to establish

law enforcement's good faith, the suppression of evidence remains an appropriate remedy where the officer has acted "in reckless disregard of the truth," the magistrate has "wholly abandoned" his judicial role, or where the warrant's particularity or probable cause foundation is so deficient as to render official belief in its validity "entirely" unreasonable. Without question there exists in the present case no like cause for Detective McNally to have known that the inspection of respondent Krull's business premises was constitutionally infirm. The search, made pursuant to a long-standing state statute which did not clearly contravene the fourth amendment, was conducted in good faith. Application of the exclusionary rule, which would not only hinder the truth-seeking function of the factfinder but effectively preclude the prosecution of respondents altogether, cannot be justified.

CONCLUSION

For the foregoing reasons, the People of the State of Illinois respectfully request that the decision of the Illinois Supreme Court suppressing evidence be reversed.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether the Fourth Amendment principle that the exclusionary rule requires suppression of evidence obtained in searches carried out pursuant to statutes, not yet declared unconstitutional, purporting to authorize searches and seizures without probable cause or search warrants, should be overruled.

2. Whether the good faith exception to the exclusionary rule applies where police officers obtain physical evidence while conducting a warrantless search pursuant to an unconstitutional procedural search statute, and while conducting the search, the officers exceed the bounds of the unconstitutional statute.

3. Whether the good faith exception to the exclusionary rule should be applied on a retroactive basis.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

STATE OF ILLINOIS,

Petitioner,

vs.

ALBERT KRULL, GEORGE LUCAS
and SALVATORE MUCERINO,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ILLINOIS

BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

Prior to the warrantless entry onto the business premises of Action Iron & Metal, Inc., various auto yards regulated by Ill. Rev. Stat. Ch. 95½, Section 5-401(e) (1981) filed a Complaint on July 21, 1980, in the United States District Court for the Northern District of Illinois to declare Section 5-401(e)

unconstitutional.[1]

The suit, captioned Bionic Auto Parts, et al. v. Fahner, et al., 518 F.Supp. 582 (N.D. Ill. 1981), was filed in the United States District Court for the Northern District of Illinois against the Illinois Attorney General, the Chicago Police Department, the Illinois Secretary of State and the State's Attorney of Cook County [hereinafter referred to as the District Court Proceedings].

While the constitutional question was under consideration by the District Court, Detective Leland McNally, Badge No. 12157, an agent of the Chicago Police Department, entered the premises of Action Iron & Metal, Inc. on July 5, 1981, at approximately 10:30 a.m. for the ostensible purpose of performing a records inspection pursuant to Ill. Rev. Stat., Ch. 95-1/2, Section 5-401(e) (1981). Detective McNally did not have a search warrant or arrest warrant. There was no probable cause for any of the officers to believe a crime was being committed or, in fact, had been committed.

Based upon the fruits of the search

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[1]Sections 5-401 et seq. provided for administrative searches for certain purposes of businesses engaged in acquiring, wrecking, recycling, rebuilding and/or selling automotive parts.

and seizures, Respondents were charged with various motor vehicle violations involving either possession of stolen motor vehicles, failure to surrender proper certificates of title or failure to obtain a junking certificate as required by statute. (Ill. Rev. Stat., Ch. 95-1/2, Sections 4-103(a)(1), 4-103(a)(4), and 3-116(c) (1981)) [hereinafter referred to as the State Court Proceedings].

On July 5, 1981, Respondent Krull and Action Iron & Metal, Inc. filed a Complaint for Injunctive and Declaratory Relief. Respondent's Complaint was consolidated with the Bionic Auto Parts case referred to above.

On July 6, 1981, Judge Milton I. Shadur held Section 5-401(e) unconstitutional in the District Court proceedings. The Court specifically found that the Statute failed to clearly define regular enforcement procedures pursuant to the requirements of Donovan v. Dewey, 452 U.S. 594 (1981).

During the proceeding before the District Court, the State stipulated that Defendant Lucas did not consent to the search and that Lucas only agreed to Detective McNally's entry onto the premises because he believed he had no choice pursuant to Section 5-401(e). A copy of the Stipulation filed with the United States District Court is included

in the Joint Appendix at 38.[2]

Based upon the District Court's decision, Defendant Krull moved to suppress evidence in the State Court proceedings. The motion was adopted by all Defendants. At the hearing on September 25, 1981, the motion was granted.[3]

The trial court found that the search authorized by Section 5-401(e) was a "two-step" process. First, the officer is entitled to examine the records required to be kept by the licensee. Second, the officer then may search the

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[2]The briefs for the Petitioner and the Amicus ignore this critical Stipulation of Fact. The Stipulation also demonstrates that Petitioner's assertion that the District Court proceedings were "unrelated" to the State Court proceeding is also incorrect. (Pet.'s brief at 3).

[3]Interestingly, the Petitioners argue that should this Court decide in their favor that the ruling should be applied retroactively because the Court should decide all cases before it "in accord with existing constitutional standards" regardless of whether those standards were in effect at the time the case arose. (Pet's. Brief at 13 f.n.4). Yet at the same time the Petitioner argues that the trial court should not have suppressed the evidence in the instant case where the regulatory statute was declared unconstitutional after the arrest but before the trial court ruled on the motion to suppress.

business premises for the limited purpose of verifying that the records are accurate.

However, the trial court determined that Detective McNally exceeded his authority under the statute. Detective McNally conducted a search of the entire business premises and that search was not limited to a verification of the records. The trial court rejected the State's argument that even if McNally exceeded the scope of the statutory authority, the search was proper because it was conducted pursuant to Defendants' consent. The State appealed to the Illinois Appellate Court.

Prior to the decision of the Illinois Appellate Court, the decision of the District Court was appealed to the Seventh Circuit Court of Appeals. During the pendency of the federal appeal, the Illinois Legislature promulgated Section 5-403 (eff. Jan. 1, 1983) to eradicate the constitutional deficiencies found in the prior statute by the District Court.

In light of the new enactment on August 23, 1983, the Seventh Circuit determined that Section 5-403 as enacted was constitutional. The Seventh Circuit specifically declined to review the District Court's ruling that Section 5-401(e) was unconstitutional. The decision of the District Court was affirmed in part and vacated in part on other grounds.

The Illinois Appellate Court was advised of the Seventh Circuit's deci-

sion. On November 23, 1983, the Illinois Appellate Court vacated the trial court's order and remanded the case to the trial court to consider certain specific questions. First, the trial Court had to determine if the as yet unadopted "good faith" exception to the exclusionary rule, validating as proper an otherwise improper evidentiary seizure, should be applied to this case. Second, the trial court had to determine if the new standard was to be applied, whether the police officials, as a matter of fact, acted in "good faith" in conducting the instant search and seizure. Third, the trial Court had to determine whether Section 5-401(e), under which Detective McNally conducted the search in question, remains unconstitutional. The Appellate Court did not disturb the trial court's findings that Officer McNally exceeded the scope of his authority in conducting the search.

On remand, the court reiterated that the search authorized by Section 5-401(e) was a "two-step" process and found that Detective McNally exceeded his authority under the statute. Detective McNally conducted a search of the entire business premises that was not limited to a verification of the records. The trial court found that Detective McNally was handed a piece of paper by Defendant Lucas[4] that listed certain vehicles. It

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[4]Judge Hogan mistakenly referred to Defendant Lucas as Defendant Krull in making certain findings of fact. That error was brought to the Court's attention and the Court corrected the

was based on this record that Detective McNally conducted the "verification" or "search" authorized by the statute. (J.A. 29). The trial court also reiterated its previous finding that Detective McNally's search was not a consent search. (J.A. 30).

The trial court further held that the Illinois Legislature brought the old statute in conformity with the Donovan decision in that the new amendments to the statute spelled out "what is the reasonable process of inspection of the premises". In so concluding, the trial court specifically adopted the reasoning of the District Court in finding the original statute unconstitutional and concluded that the new legislation provided the remedy for the unconstitutionality of the old statute. The trial Court thus concluded that the predecessor statute was unconstitutional.

The trial court then addressed the issue of the good faith exception to the exclusionary rule. The trial court concluded, inter alia, that the decision in Illinois v. Gates, 462 U.S. 213 (1983) was distinguishable because the "good faith" exception to the exclusionary rule did not apply to a situation where the statute authorizing the administrative search negated the warrant requirement in the first instance. Gates specifically addressed the situation where an unlawful search was conducted pursuant to the issuance of a search warrant. (J.A. 32). The State then appealed directly to the

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error. (J.A. 30).

Supreme Court of Illinois.

In affirming the trial court, the Illinois Supreme Court rejected the State's arguments that are now being urged upon this Court. The Illinois Supreme Court rejected the State's attempt to compare the present case to Michigan v. DeFillippo, 443 U.S. 31 (1979) wherein this Court upheld an arrest made pursuant to an ordinance which subsequently was found to be invalid. The Illinois Supreme Court pointed out that this Court of the United States continues to utilize the "substantive-procedural dichotomy" in determining whether a search conducted pursuant to an unconstitutional statute is invalid. The Illinois Supreme Court concluded that good faith reliance on a statute defined as "procedural" in nature will not cure an otherwise illegal search. People v. Krull, 107 Ill.2d 107, 118-119 (1985). Notably, the "substantive-procedural" analysis set forth in Michigan v. DeFillippo was reaffirmed by this Court in United States v. Leon, 468 U.S. 897 (1984), a case relied upon by Petitioners.

SUMMARY OF ARGUMENT

A. In Kolender v. Lawson, 461 U.S. 352, 362 f.n. 1 (1983), Justice Brennan stated that "...we have long recognized that the government may not 'authorize police conduct which trenches upon Fourth Amendment rights, regardless of the labels which it attaches to such conduct'."

The principles of the good-faith exception to the exclusionary rule, articulated in connection with the good-faith reliance of a police officer upon a particular search warrant issued by a detached neutral magistrate, do not apply to the instant case at all.

The issue here is whether a legislature may abrogate on an industry-wide basis a citizen's Fourth Amendment rights, protections and privileges through the enactment of an unconstitutional regulatory inspection scheme. This Court has unequivocally answered the question in Michigan v. DeFillippo, 443 U.S. 31 (1979) and in United States v. Leon, 468 U.S. 897 (1984):

> We have held, however, that the exclusionary rule requires suppression of evidence obtained in searches carried out pursuant to statutes, not yet declared unconstitutional, purporting to authorize searches and seizures without probable cause or search warrants. Leon at 912 f.n. 8.

The rationale supporting the application of the good-faith exception

to the exclusionary rule does not apply with equal force to constitutional errors promulgated by the legislative branch of government in enacting procedural statutes.

B. The findings of fact made by the trial court were undisturbed on appeal. The trial court held that in conducting the instant search the police officers acted beyond the scope of the authority granted by Section 5-401(e). This inspection statute only permitted officers to check the records of certain business establishments and then to conduct a search limited to the verification of the accuracy of those records. Instead, police officers conducted a warrantless, wholesale inspection of the entire premises. The trial court also found, and the State stipulated, that the search was not a consent search.

Therefore, assuming, arguendo, that this Court determines that the good-faith exception to the exclusionary rule should apply to searches conducted pursuant to procedurally unconstitutional statutes, as in the instant case, the decision granting the motion to suppress should not be reversed. The police officers did not conduct the search in good faith because they failed to execute the search within the permissible limits authorized by the inspection statute.

ARGUMENT

I. THE FOURTH AMENDMENT PRINCIPLE THAT THE EXCLUSIONARY RULE REQUIRES SUPPRESSION OF EVIDENCE OBTAINED IN SEARCHES CARRIED OUT PURSUANT TO STATUTES, NOT YET DECLARED UNCONSTITUTIONAL, PURPORTING TO AUTHORIZE SEARCHES AND SEIZURES WITHOUT PROBABLE CAUSE OR SEARCH WARRANTS, SHOULD NOT BE OVERRULED.

The decision of the Illinois Supreme Court consistently applied an unbroken line of authority recently reaffirmed by this Court. That authority stands for the proposition that the exclusionary rule applies to suppress evidence where the state statute, not previously declared unconstitutional, purports to authorize searches and seizures without probable cause or search warrants.

The Illinois Supreme Court relied on this Court's decision in Michigan v. DeFillippo, wherein this Court specifically ruled that a search will not be upheld where made pursuant to a procedural statute not yet declared unconstitutional, and which authorizes unlawful searches, even though the arrest and search were made in good faith reliance on the statute. The "substantive-procedural dichotomy" analysis articulated by this Court was applied by the Illinois Supreme Court in analyzing the law and facts in the instant case.

The Illinois Supreme Court stated:

In holding the search constitu-

tional, however, the Supreme Court in DeFillippo distinguished between substantive laws, which define criminal offenses, and procedural laws, which directly authorize searches. An arrest and search conducted pursuant to a substantive law like the Detroit ordinance will be upheld provided the officer has probable cause to make the arrest and he relied on the statute in good faith. In contrast, an arrest and search made pursuant to a procedural statute, not yet declared unconstitutional, and which authorizes unlawful searches, will not be upheld, even though the arrest and search were made in good-faith reliance on the statute. (443 U.S. 31, 39, 61 L.Ed.2d 343, 351, 99 S.Ct. 2627, see, e.g., Torres v. Puerto Rico, (1979), 442 U.S. 465, 61 L. Ed.2d 1, 99 S. Ct. 2425...The court continues to utilize the substantive-procedural dichotomy in determining whether a search conducted pursuant to a statute was valid. United States v. Leon, (1984), 468 U.S. 897, 911-913, 82 L.Ed.2d 677, 691, 104 S. Ct. 3405, 3415-16; see e.g., Ybarra v. Illinois (1979), 444 U.S. 85, 62 L. Ed.2d 238, 100 S. Ct. 338.

Section 5-401(e), unlike the Detroit ordinance in DeFillippo, did not define a substantive criminal offense. Rather, it directly authorized warrantless searches. Thus section 5-401(e) is included in the category of statutes which the Supreme Court has defined as

procedural. Any good-faith reliance on such a statute will not cure an otherwise illegal search. See, e.g., Almeida-Sanchez v. United States, (1973), 413 U.S. 266, 37 L. Ed. 2d 596, 93 S. Ct. 2535; Sibron v. New York, (1968), 392, U.S. 40, 20 L. Ed. 2d 917, 88 S. Ct. 1889; Berger v. New York, (1967), 338 U.S. 41, 18 L. Ed.2d 1040, 87 S. Ct. 1873. People v. Krull, 107 Ill.2d 107, 118-119 (1985).

Notably, the Illinois Supreme Court relied on the reasoning of the Leon decision, to support its holding. In Leon, this Court reaffirmed the principles enunciated previously in Michigan v. DeFillippo stating:

> We have held, however, that the exclusionary rule requires suppression of evidence obtained in searches carried out pursuant to statutes, not yet declared unconstitutional, purporting to authorize searches and seizures without probable cause or search warrants. See, e.g., Ybarra v. Illinois, 444 U.S. 85, 100 S. Ct. 338, 62 L.Ed.2d 238 (1979); Torres v. Puerto Rico, 442 U.S. 465, 99 S.Ct. 2425, 61 L.Ed.2d 1 (1979); Almeida-Sanchez v. United States, 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973); Sibron v. New York, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968); Berger v. New York, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967). Those decisions involved statutes which by their own terms authorized searches under the circumstances

> which did not satisfy the traditional warrant and probable-cause requirements of the Fourth Amendment. Michigan v. DeFillippo, 43 U.S. 31, 39 (1979). The substantive Fourth Amendment principles announced in those cases are fully consistent with our holding here. Leon, 468 U.S. at 912 f.n. 8.

The Petitioner relies heavily on the Leon decision in support of its argument. At the same time, Petitioner and the Amicus ignore the fact that this Court expressly reaffirmed the principles of Michigan v. DeFillippo in the Leon decision.[5] Therefore, in order to adopt the Petitioner's argument, this Court must overrule its decisions in a long line of cases standing for a contrary proposition of law.

An examination of Petitioner's arguments in favor of reversing stare decisis in this case reveals nothing more than public policy arguments. However, these public policy arguments are grounded on faulty and unsubstantiated factual premises.

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[5]At one point in the Petitioner's brief, it attempts to misquote the precise language of Leon by substituting the word "statute" for "warrant." (Pet.'s brief at 12). The substitution hardly would comport with the true intent of the remainder of the opinion, not addressed by Petitioner, which reaffirms the substantive-procedural dichotomy.

First, Petitioner argues that because the Legislature "infrequently" enacts unconstitutional statutes which abrogate a citizen's constitutional rights, as did the statute in the instant case, that there is no need to control the Legislature with the threat of a punitive sanction. (Petitioner's Brief at 11). The argument really misses the mark.

A single Legislative enactment may result in numerous and repeated abuses of citizens' constitutional rights, particularly where the statute is designed to regulate an entire industry. After hearing evidence in the Bionic Auto Parts case, the District Court specifically found that searches conducted pursuant to Section 5-401(e) abused the rights of licensees, their agents and employees on an industry-wide basis. The District Court held:

> Indeed we need not speculate here as to 'unbridled discretion' and its exercise. Evidence during the preliminary injunction hearing showed that searches of premises were often made by the enforcement officers without the predicate or even pretense that they were simply corroborative of the record-keeping requirements. Totally without warrant (both literally and figuratively), the officers conducted inventory searches extending over many hours and placed indelible markings on various of plaintiffs' auto parts. On another occasion they entered a licensee's premises in a claimed search for a law

> violator without a warrant and without any semblance of a showing of probable cause. It is clear that they viewed licensees as fair game, engaged in an activity that in their view was almost malum in se (Tr. 29: 'I licensed you. I can go anywhere I want.'). Bionic Auto Parts, 518 F. Supp. at 585-586.

Indeed, the Petitioner, in its own brief, acknowledges this point. "A search or seizure made pursuant to an individual warrant will typically not be repeated, searches authorized in pervasively regulated industries will by definition occur more frequently...". (Petitioner's brief at 11, f.n. 3). This point is a critical distinction between the application of the good faith exception to a mistake made by a magistrate in issuing a single warrant without probable cause and the conduct of the Legislature in enacting an unconstitutional procedural statute.

When the Legislature abrogates the Fourth Amendment rights of an identifiable group of citizens by the enactment of a regulatory statute designed to remove the protections afforded by the warrant and probable cause safeguards, the violation arising out of an unconstitutional statute repeats itself with each and every search conducted day after day. There is nothing in the decisions of this Court or any other court which supports as a matter of law the repeated abuse, on an industry-wide basis, of citizens' Fourth Amendment rights.

Justice O'Connor specifically

recognized such a limitation on the scope of the application of the exclusionary rule where such widespread abuse was present. In I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 104 S.Ct. 3479, 3490 (1984), Justice O'Connor stated:

> Our conclusions concerning the exclusionary rule's value might change, if there developed good reason to believe that Fourth Amendment violations by INS officers were widespread. C.f. United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, (BLACKMUN, J., concurring).[6]

In the instant case, the Court need not speculate regarding the abuse of licensees on an industry-wide basis. The findings of the District Court based upon an evidentiary hearing leave no room for doubt.

Second, Petitioner argues that even if some sanction or remedy should be formulated to address these abuses, the remedy should be one which denies a litigant the right to raise the issue by way of a motion to suppress. Instead, the litigant should be required to file a new declaratory judgment action because the citizen whose rights have been

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[6]Justice Blackmun, concurring in Leon, specifically observed that the scope of the exclusionary rule "is subject to change in light of changing judicial understanding about the effects of the rule outside the confines of the courtroom." Leon, 468 U.S. at 928.

violated has the "financial ability to seek declaratory or injunctive relief as did the association of auto yards in the [district court case]." (Petitioner's Brief at 11, f.n. 3).

By this argument, the Petitioner would have this Court improperly parse out a remedy based on a citizen's ability to pay for justice. Such an argument blatantly flies in the face of every principle upon which this country was built.

Third, both the Petitioner's and the Amicus briefs point to the importance of the remedial purpose sought to be protected by the enactment of this particular regulatory scheme. The District Court, the Illinois Appellate Court and the Illinois Supreme Court had no quarrel with this proposition. The Petitioner argues, however, that the remedial purpose of the statute is interfered with by application of the principles of the exclusionary rule. The argument is premised upon an inaccurate factual analysis.

First, the briefs of the Petitioner and Amicus incorrectly argue that there were no industry abuses here and therefore, the remedial aspects of the legislation should not be interfered with by the application of the exclusionary rule. Contrary to these assertions, the District Court opinion points out that this particular legislation led to repeated abuses in the industry.

Second and more important is the fact that the Illinois legislature

followed the advice of the District Court[7] and re-enacted the statute to remedy the constitutional deficiencies set forth in the District Court opinion. In so doing, the State Legislature demonstrated its ability to simply and quickly re-enact the statute to conform to the constitutional requirements of the Fourth Amendment. The State Legislature even "beat" the Seventh Circuit to the proverbial punch by re-enacting the legislation prior to the Seventh Circuit deciding the question on appeal. Therefore, the remedial purpose of the statute was preserved and with the exception of the short hiatal period needed to re-enact this legislation, the

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[7]The District Court stated:

This decision may well represent a Pyrrhic Victory for Plaintiffs. Justice Stewart was plainly right in his Donovan dissent in concluding that it charts the route by which a legislature may supersede the Fourth Amendment on an industry by industry basis (452 U.S. at 609, 101 S.Ct. at 2543). Thus, the Illinois General Assembly can overcome any constitutional infirmity if it simply amends the Act by following the Donovan road map (as amplified in this decision). Bionic Auto Parts, et al., v. Fahner, et al., 518 F.Supp. 582, 586 at f.n. 3 (N.D. Ill. 1981).

industry continued to be regulated.[8]

Further, the Petitioner and the Amicus briefs argue that good faith reliance on a presumptively constitutional statute should prevent a citizen from effectively vindicating his constitutional rights by use of the suppression remedy. There are several "presumptions" in this argument that fail to withstand scrutiny.

First, there was no strong presumption of constitutionality with respect to the statute in question. In its discussion of the case People v. Allen, 407 Ill. 596 (1950), the Petitioner attempts to argue that the statute had withstood numerous prior constitutional assaults.

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[8]Even the legislature did not intend to question the District Court's judgment that the statute was indeed unconstitutional. However, the Petitioner attempts to argue that the District Court incorrectly applied the "Colonnade-Biswell exception" to the issue of constitutionality. (Pet.'s Brief at 18-20). Respondents are content to rely on the District Court's lengthy and well-reasoned decision in this regard. Respondents likewise agree with the Seventh Circuit's ruling when it declined to review the constitutionality of the old statute because the legislature re-enacted the legislation. In raising the constitutional issues here, Petitioner improperly is engaging in a collateral attack upon the Seventh Circuit's determination.

Yet in the State's brief before the Illinois Supreme Court, the State was constrained to admit that the issue of the constitutionality of Section 5-401(e) had not previously been ruled upon by the Illinois Supreme Court. In fact, a careful reading of Allen demonstrates that the issue was not even considered by the Supreme Court. Allen is further distinguishable from the instant case in that:

1. The search in Allen was not conducted pursuant to Section 5-401(e);

2. The issue of the constitutionality of Section 5-401(e) was not raised in Allen; and

3. The Allen search was a consent search whereas the trial court found that there was no consent in the instant case.[9]

Indeed, at the time police officers conducted the instant search, the Chicago Police Department had been named as a party in the District Court proceedings wherein the constitutional validity of this particular statute was at issue. The State was clearly on notice with

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[9]The only other case cited by the Petitioner to support its assertion that Section 5-401(e) has withstood constitutional attacks was People v. Levy, 370 Ill. 82 (1938). Again, Levy involves a different statute and not Section 5-401(e).

respect to this matter.

Moreover, the Illinois legislature was put on notice by this Court in DeFillippo and Leon that if a procedural statute directly authorizing an unconstitutional search was enacted, the fruits of the search and seizure would be suppressed. The legislature even was provided a roadmap by this Court in Donovan v. Dewey, 452 U.S. 594 (1982); Marshall v. Barlows, 436 U.S. 307 (1978); and Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) to enable it to reach a constitutional destination.[10]

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[10]In Leon, this Court never intended to create an exception that would emasculate the rule. Suppression remains an appropriate remedy in four situations: (1) if the affiant provides information he knows or should know is false; (2) if the magistrate wholly abandons his judicial role; (3) if the affidavit is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; or (4) if the warrant is so facially deficient that executing officers cannot reasonably presume it valid. Leon, 468 U.S. at 923. As a practical matter, the Petitioner and the Amicus argue at length that a police officer always relies in good faith on a statute because it is presumptively constitutional. On that basis, a police officer never could engage in bad faith. Thus, the good-faith exception to the exclusionary rule applied in the context of the instant case becomes the rule and evidence never will be excluded.

Thus, the critical focus here is not whether a police officer reasonably relied on a legislative enactment, but whether the legislature did its job when it chose to remove the protections afforded every citizen by the warrant and probable cause protections and substitute its own regulatory scheme. The requirements of a warrant and probable cause insulate a citizen from the legislative branch of government. The application of these protections by a detached and neutral magistrate is a further safeguard to protect the citizen's Fourth Amendment rights. However, where the legislature abrogates the protections of the Fourth Amendment and the supervision of the judiciary, it must be held to the higher standard articulated by this Court in DeFillippo and Leon. This is simply not the case where a detached neutral magistrate, applying constitutional safeguards of a warrant and probable cause, makes a bad judgment call with respect to a single probable cause determination that is subsequently relied upon by a police officer in good faith. Indeed, the statutory scheme is designed to abandon the role of a neutral and detached magistrate.

The Petitioner and Amicus simply ignore one of the policies underlying the exclusionary rule. In Dunaway v. New York, 442 U.S. 200, 217-218 (1979), this Court recognized that the use of evidence obtained in violation of constitutional rights is excluded not only as a deterrent to police conduct, but also because the use of such tainted evidence "is more likely to compromise the integrity of the courts." Thus, when the Supreme Court

concluded in DeFillippo and Leon (which cites the Dunaway opinion, Leon, 468 U.S. at 911, f.n. 7), that the exclusionary rule applied to suppress evidence obtained pursuant to procedural statutes that authorized searches under circumstances which did not satisfy traditional warrant and probable cause requirements of the Fourth Amendment, the focus was not at all upon the deterrence policy of the rule. The focus implicitly rested upon the protection of the integrity of the courts and the sanctity of the Constitution.

The point advocated by the Respondents is not whether exclusion of the evidence alters the behavior of police officers one way or another. The point is, and one which repeatedly has been found by the trial court through the Illinois Supreme Court, that the principles of the good faith exception to the exclusionary rule and all the arguments about good or bad police conduct that are attendant to that rule do not apply here at all.[11]

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[11]Both the Sixth and Ninth Circuits have held that the "good faith exception" to the exclusionary rule does not apply beyond the warrant context. United States v. Merchant, 760 F.2d 963, 968 at f.n. 6 (9th Cir. 1985); and United States v. Morgan, 743 F.2d 1158, 1165 (6th Cir. 1984); See also, United States v. Rule, 594 F.Supp. 1223, 1247 (D.C. Me. 1984) for the proposition that a "prosecutor may not usurp the Magistrate's function, and where the court determines that such conduct has occurred, the effect of that

Simply stated, the good faith exception by its own terms is a doctrine intrinsically tied into the requirement of a warrant and the law enforcement officer's conduct with respect to the execution of that warrant. The Leon decision defines the good faith exception and the "objectively reasonable" standard with a view toward incorporating the requirement of review by a detached and neutral magistrate. This particular exception, defined as such, does not apply in the context of a procedural statute that authorizes a search procedure that abrogates the judicial review requirement. Petitioner's analysis is simply inapposite.

Justice Brennan further elucidated this distinction between unlawful police conduct on the one hand and an unconsti-

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conduct is not to be vitiated by the prosecutor's subjective good-faith state of mind." This same argument applies with equal force to the role of the legislature; and United States v. Guarino, 610 F.Supp. 371, 378-39 (D.C. R.I. 1984) for the proposition that an officer's conduct does not satisfy the "objectively reasonable" standard set forth in Leon in light of the known requirement that the Magistrate first engage in the review process. The statute in the instant case abrogates the Magistrate's role and therefore, it is impossible to apply the same "objectively reasonable" standard in the context of this case.

tutional state law on the other in the case Kolender v. Lawson, 461 U.S. 352, 362, f.n. 1, (BRENNAN, J., concurring):

> We have not in recent years found a state statute invalid directly under the Fourth Amendment, but we have long recognized that the government may not "authorize police conduct which trenches upon Fourth Amendment rights, regardless of the labels which it attaches to such conduct." Sibron v. New York, 392 U.S. 40, 61, 20 L.Ed.2d 917, 88 S.Ct. 1889, 44 Ohio Ops2d 402 (1968). In Sibron, and in numerous other cases, the Fourth Amendment issue arose in the context of a motion by the defendant in a criminal prosecution to suppress evidence against him obtained as the result of a police search or seizure of his person or property. The question thus has always been whether particular conduct by the police violated the Fourth Amendment, and we have not had to reach the question whether state law purporting to authorize such conduct also offended the Constitution. In this case, however, appellee Edward Lawson has been repeatedly arrested under authority of the California statute, and he has shown that he will likely be subjected to further seizures by the police in the future if the statute remains in force. (Citations Omitted). It goes without saying that the Fourth Amendment safeguards the rights of those who are not prosecuted for crimes as well as the rights of those who are.

In response to this argument, Petitioner weakly argues that the Legislature knows that if its statute fails to survive judicial scrutiny, that the "condemnation of its actions [will] be highly visible" and the "laborious process of legislative creation must begin anew." (Petitioner's Brief at 12).

Respondents find it impossible to believe that the average citizen in the State of Illinois or the City of Chicago has knowledge about this particular case or the fact that the regulatory statute was struck down. This particular statute is not one that would be subject to common knowledge. The citizens elect legislators to ensure that they do not have to look over their shoulder every time a new statute is passed. The citizens also have faith in their judicial system that a law abrogating their constitutional rights will be struck down.

As for the "laborious process" referred to by Petitioner, the Illinois legislature was able to re-enact the legislation before the case was argued on appeal. Neither one of Petitioner's "safeguards" serve to protect the citizen or provide a remedy for a violation of rights. Without the ability to appear before a neutral judge and move to suppress evidence, the citizenry is left without any remedy.[12]

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[12]The importance of preserving the distinct role of the judiciary in reviewing the conduct of the legislature

Moreover, once the unconstitutional statute is re-enacted to conform to the requirements of law, the citizen no longer has the suppression remedy available to him. Therefore, the State's argument that new crimes will go unpunished is disproved by the very facts in this case.

Finally, the case law cited by the Petitioner does not support its argument. Petitioner specifically relies on this

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and the impact of legislation on the rights and privileges of the citizenry was articulated by the Founding Fathers of this Nation. Alexander Hamilton in The Federalist Papers, No. 81, wrote:

> From a body [the legislature] which had had even a partial agency in passing bad laws we could rarely expect a disposition to temper and moderate them in the application. The same spirit which had operated in making them would be too apt to operate in interpreting them; still less could it be expected that men who had infringed the Constitution in the character of legislators would be disposed to repair the breach in the character of judges. At 483.

Thus, Petitioner's philosophy that the embarrassment of the legislature at passing a "bad law" provides a sufficient safeguard to protect the citizenry in lieu of a motion to suppress was rejected at least as early as 1787.

Court's decision in Almeida-Sanchez v. United States, 413 U.S. 266 (1973) and other "good faith" border search cases such as United States v. Peltier, 422 U.S. 531 (1975). However, this Court explicitly stated in DeFillippo, 443 U.S. at 31, in reviewing its decision in Almeida-Sanchez that, where the federal statute permitting border searches within a "reasonable distance" of the border was declared unconstitutional, the search was held invalid despite the fact that the statute had not been declared unconstitutional at the time of the search.

The public policy arguments asserted by Petitioner do not provide a sufficient basis for this Court to reverse its decision in Michigan v. DeFillippo; United States v. Leon; and Kolender v. Lawson. The rationale supporting the application of the good-faith exception to the exclusionary rule does not apply with equal force to the constitutional errors promulgated by the legislative branch of government in enacting procedural statutes.

2. THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE DOES NOT APPLY WHERE POLICE OFFICERS OBTAIN PHYSICAL EVIDENCE WHILE CONDUCTING A WARRANTLESS SEARCH PURSUANT TO AN UNCONSTITUTIONAL PROCEDURAL SEARCH STATUTE, AND WHILE CONDUCTING THE SEARCH, THE OFFICERS EXCEED THE BOUNDS OF THE UNCONSTITUTIONAL STATUTE.

Contrary to the assertions contained in Petitioner's brief and the supporting Amicus, at no time did the trial court hold that the conduct of the police officers in executing the instant search was a "permissible activity." (Petitioner's Brief at 5). The trial court expressly held that the officers exceeded the authority of the statute regardless of its constitutionality. (J.A. 29).[13] The court further held that the search

[13]The Amicus brief completely ignores this fact and the fact that the Supreme Court of Illinois specifically held that the search exceeded the scope of the officer's authority. People v. Krull, 107 Ill.2d at 120. The Amicus treats this as an unresolved factual dispute to be examined on remand. (Amicus at 28 f.n. 11). The argument is contradicted by the record in this case. The Amicus goes on to speculate that if the search had been conducted under the newly-enacted statute, that it would have been constitutional. There is absolutely no support for this argument in the record and it is clearly not supported by the opinion of the Illinois Supreme Court in this case.

was not a consent search. (J.A. 20, 30). Indeed, the State stipulated that search was not a consent search. These findings of fact were not disturbed on appeal. Nor should this Court reconsider the factual findings of the trial court. A trial court's determination on a motion to suppress evidence will be overturned only if it is manifestly erroneous. People v. Haskins, 101 Ill.2d 209 (1984); People v. Long, 99 Ill.2d 219 (1983). No argument was made in the appellate court that this finding was manifestly erroneous or even in error. Therefore, the Petitioner must be bound by the record as it stands.

Specifically, the trial court found the following facts:

> He [Detective McNally] was there to conduct an inspection, a license check pursuant to authority granted by the statute, and he asked for the required records, which is commonly known as the police book, which could not be produced at that time. However, Mr. [Lucas] had taken down some notes of vehicles that he had purchased. And it was based on these records then that Detective McNulty conducted his search. I wouldn't call it a search, but a verification.
>
> Had he only verified the four or five vehicles that were indicated on this particular sheet of paper, I think he would have been within his statutory authority; because the statute says first you check the records, then you have the oppor-

tunity to verify the records are accurate. It's a two-step process. Now, he didn't do that.

He took those records, and then he said to Mr. [Lucas], may I look around.

If you recall, my prior finding was that that was not a consent search. Because Mr. [Lucas], I'm sure being in the business, was aware of the officer's authority under the statute, that he had, if you want to call it, the right, or at least the ability to go in there and look around in a certain described manner.

So, Mr. [Lucas] really didn't give him consent. He did not give him consent. (J.A. 29-30), (emphasis added).

Therefore, even assuming, arguendo, that this Court determined that the good-faith exception to the exclusionary rule should apply to searches conducted pursuant to procedurally unconstitutional statutes as in the instant case, the decision granting the motion to suppress should not be reversed.

The police officers acted beyond the scope of the authority of the statute and therefore, were not acting in good faith. Thus, the exclusionary rule would apply to suppress the evidence in this case.

3. THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE SHOULD NOT BE APPLIED ON A RETROACTIVE BASIS

On July 5, 1981, the search was conducted by the Chicago Police Department. On July 6, 1981, the District Court determined that the statute authorizing the search was unconstitutional. On September 25, 1981, the State Court granted Defendants' Motion to Suppress. In 1984, this Court decided the Leon case. Petitioner argues that the good faith exception to the exclusionary rule articulated in the Leon decision should be applied retroactively.

Petitioner's argument is simply inconsistent with respect to the retroactivity issue. Petitioner argues on the one hand that the District Court's determination regarding the unconstitutionality of the state statute should not have been applied to a subsequent determination with respect to the motions to suppress because the search occurred prior to the District Court's decision. Thus, Petitioner argues that the district court decision should not be applied retroactively to undecided cases pending before the state court.

On the other hand, Petitioner argues that Leon should be applied retroactively to cases where the issues have been decided by the lower courts prior to the issuance of the Leon decision.

Petitioner's retroactivity analysis is confused. The Courts have generally, although not always, applied decisions retroactively to cases where the issues

before the court have not been decided and not to cases where the issues were fully determined prior to the issuance of a new decision. See, Kirk v. United States, 510 A.2d 499 (D.C. App. 1986) for a more detailed historical analysis of the development of the law in this area. According to the Petitioner's argument, this Court would be required to apply the Leon decision to every case decided prior to the issuance of the Leon decision wherein the trial court granted a Defendant's motion to suppress based upon an erroneous belief that a good faith exception to the exclusionary rule did not exist or did not apply.

However, the analysis extends beyond this simple argument. Indeed, this Court recognized in its decision in United States v. Johnson, 457 U.S. 537, 545 (1982) that its historical practice of "selective awards of retroactivity" was probably not the best practice. In Johnson, the Government argued that all rulings resolving unsettled Fourth Amendment questions should be non-retroactive. The Court rejected this reasoning on the basis that "law enforcement officials would have little incentive to err on the side of constitutional behavior." 537 U.S. at 561.

The Petitioner is now arguing that the Court should apply this Fourth Amendment decision retroactively to empower the trial court to do something that it lacked authority to do at the time that the case was originally before it, to wit: to apply the good faith exception to the exclusionary rule and admit the evidence.

The State Court lacked authority to apply this exception because the Leon decision signalled "a clear break with the past." Johnson, 457 U.S. at 499-50. But even the Leon decision did not decide the issues in the instant case. Indeed, this Court will be required to overrule principles of stare decisis articulated in Michigan v. DeFillippo and Kolender v. Lawson to reach the result urged by the Petitioner. Thus, not only does the decision in Leon represent a clear break from past precedent, but a new decision in this case will also require a clear break from past precedent. This Court has repeatedly declined to apply a fixed rule of retroactivity "where the new rule of law is so clear a break with the past that it has been considered nonretroactive almost automatically." Shea v. Louisiana, 470 U.S. 51, 105 S.Ct. 1065, 1070 at f.n. 5 (1985).

The retroactive application would also result in an "actual" inequitable result to these defendants. See, Johnson, 457 U.S. at 556-57 f.n. 16. In those cases where the state chose not to appeal, the order granting the motions to suppress evidence will remain in full force and effect. Only in this case, where the matter has reached this Court's attention, will the Defendants be required to relitigate their case.[14]

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[14]Of course, the trial court and the Illinois Supreme Court determined that the officers in executing the search did not act within the scope of their statutory authority. The Petitioner has

In the alternative, if this Court were to apply its decision in the Leon case retroactively, Respondent submits that the Court would nonetheless be required to affirm the decision of the Illinois Supreme Court. The Leon decision also reaffirmed the long-standing principle that the exclusionary rule requires suppression of evidence obtained in searches carried out pursuant to statutes, not yet declared unconstitutional, purporting to authorize searches and seizures without probable cause or search warrants. The granting of the good faith exception to the exclusionary rule in Leon was clearly not intended to change this result.

CONCLUSION

Accordingly, Respondents request this Court to affirm the Illinois Supreme Court's decision upholding the suppression of evidence seized pursuant to an

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never appealed the correctness of this factual determination except to collaterally attack those findings here. Thus, even if this Court applied the good faith exception, the officers did not act in good faith.

unconstitutional procedural statute.

Respectfully submitted,

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No. 85-608

In the Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF ILLINOIS, PETITIONER

v.

ALBERT KRULL, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether evidence seized in reasonable reliance upon a statute authorizing warrantless administrative searches should be admissible, even though the statute is subsequently found to violate the Fourth Amendment.

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INTEREST OF THE UNITED STATES

The issue in this case is whether evidence seized by a law enforcement officer in reasonable reliance upon a state statute authorizing a warrantless administrative search must be suppressed if the statute is subsequently found to violate the Fourth Amendment. The Court's analysis and resolution of that question is likely to shape the development of the "good faith" exception to the exclusionary rule recognized in *United States* v. *Leon*, 468 U.S. 397 (1984). This case therefore may have a significant impact upon the admissibility of evidence in federal criminal prosecutions.

STATEMENT

1. Illinois has adopted a comprehensive statutory scheme designed to curb trafficking in stolen automobile parts. Persons who sell motor vehicles, deal in automotive parts, process scrap metal, or engage

in similar businesses must obtain a license from the Secretary of State (Ill. Ann. Stat. ch. 95½, § 5-301 (Smith-Hurd Supp. 1986)). The licensees are required to maintain records setting forth the identification numbers of all motor vehicles and automobile parts that they purchase or sell (*id.* § 5-401.2). In 1981—when the events at issue in this case occurred—the statute required licensees to permit state officials to inspect these records and to allow "examination of the premises of the licensee's established place of business for the purpose of determining the accuracy of required records" (*id.* § 5-401(e) (Smith-Hurd Supp. 1984-1985)).[1]

On July 5, 1981, at approximately 10:30 a.m., Detective McNally, an officer of the Chicago police department, visited Action Iron and Metal Co., a wrecking yard operated by respondents.[2] When he arrived, Detective McNally saw tow trucks bringing automobiles into the yard and leaving without them. McNally approached respondent George Lucas, identified himself as a police officer, and asked whether

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[1] The inspection provision stated (Ill. Ann. Stat. ch. 95½, § 5-401(e) (Smith-Hurd Supp. 1984-1985)):

> Every record required to be maintained under this Section shall be open to inspection by the Secretary of State or his authorized representative or any peace officer for inspection at any reasonable time during the night or day. Such inspection may include examination of the premises of the licensee's established place of business for the purpose of determining the accuracy of required records.

The legislature added several limitations to this administrative inspection authority in 1982. See *id.* § 5-403 (Smith-Hurd Supp. 1986).

[2] Detective McNally's regular assignment was to inspect automobile wrecking yards pursuant to the state statute authorizing such inspections (9/25/81 Tr. 12).

the yard was open for business. Lucas stated that the yard was open and that he was in charge of purchasing automobiles. McNally then asked Lucas whether he could examine the yard's auto parts license and the records of its motor vehicle purchases. Lucas stated that he did not know where the license and the formal records were located, but he gave the officer a pad of paper that Lucas said was a record of the vehicles that had been purchased by Action Iron. Detective McNally examined the pad of paper and then asked Lucas if he "had any objection to my looking at the cars in the yard." Lucas replied, "'Go right ahead.'" Pet. App. 5-6; 9/25/81 Tr. 24-26.

Detective McNally then looked at several vehicles in the yard and made notations of their serial numbers. After using his mobile computer to check the vehicle serial numbers against the identification numbers of stolen automobiles, McNally found that three of the vehicles in the yard had been stolen. He also noted that the vehicle identification number had been removed from a fourth vehicle. The officer then seized the vehicles and arrested respondent Lucas. Respondent Krull, the holder of the license for the wrecking yard, and respondent Mucerino, who was present in the yard on the day of the search, were arrested later. Pet. App. 6-7; 9/25/81 Tr. 8-9, 11-12, 18-19, 26. Respondents were charged with various criminal violations of the Illinois motor vehicle statutes, including possession of stolen motor vehicles, failure to surrender proper certificates of title, and failure to obtain a junking certificate (see Ill. Ann. Stat. ch. 95½, §§ 4-103(a)(2) and (4), 3-116(c) (Smith-Hurd Supp. 1986)).

2. The trial court granted respondents' motion to suppress the evidence. The court observed that the day after the search at issue in this case, a federal

district court had declared the statute authorizing the inspection of wrecking yards unconstitutional. See *Bionic Auto Parts & Sales, Inc.* v. *Fahner*, 518 F. Supp. 582 (N.D. Ill. 1981), vacated on other grounds, 721 F.2d 1072 (7th Cir. 1983).[3] The trial court in the present case adopted the reasoning of the district court in *Bionc Auto Parts* and held that the "declaration of unConstitutionality [*sic*] of that Statute affects all pending prosecutions not completed. And therefore, I'm going to sustain the motion based on the District Court's ruling of unConstitutionality [*sic*]" (9/25/81 Tr. 31).

The Illinois intermediate appellate court vacated the trial court's decision and remanded the case for further proceedings (*People* v. *Krull*, No. 81-2621 (Nov. 23, 1983)). The appellate court noted that one of the State's arguments was that suppression of the evidence was not appropriate because the officer "acted in good faith when [he] relied on this statute" (slip op. 2). The appellate court therefore directed the trial court to make a determination regarding the good faith issue and to reconsider the constitutionality of the statute in light of the subsequent decision of the Seventh Circuit in the *Bionic Auto Parts* case (*Krull*, slip op. 5).

On remand, the trial court reaffirmed its decision granting the motion to suppress. It declined to reconsider its original ruling regarding the constitutionality of the statute, stating that its "original ruling that this particular section is unconstitutional will stand" (7/9/84 Tr. 9). The court further held that a police officer's good faith is relevant only in cases in which the officer acts pursuant to a warrant. The court therefore ruled that its decision to grant the motion to suppress would not be affected even if it found that Detective McNally had acted in good faith (*id.* at 10).

3. The Supreme Court of Illinois affirmed (Pet. App. 1-24).[4] The court noted that "some legislative schemes authorizing warrantless administrative searches have survived fourth amendment scrutiny" because "the assurance of regularity afforded by a warrant may be unnecessary where there has been a long and extensive regulatory presence in a certain industry" (*id.* at 12). The court found that "[t]here is certainly a strong public interest in preventing the theft of automobiles and the trafficking in stolen automobile parts" and that the statute at issue in this case furthered that "strong public policy" (*id.* at 15). The court also found that it was "reasonable to assume that warrantless administrative searches are necessary in order to adequately control the theft of automobiles and automotive parts" (*id.* at 16). The court concluded that the statute was unconstitutional, however, because it "vested State officials with too much discretion to decide who, when, and how long to search" (*ibid.*).

The court rejected the State's argument that the search could be upheld because the officer acted in "'good faith' reliance" on the statute authorizing the search. It observed that the authority cited by the

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[3] The district court in *Bionic Auto Parts* found that the statute did not impose sufficient limitations upon law enforcement officers' discretion and therefore violated the Fourth Amendment (518 F. Supp. at 585-586). The Illinois legislature amended the statute in 1982 to limit the timing, frequency, and duration of the administrative searches. On the appeal from the district court's order, the Seventh Circuit declined to address the validity of the original statute, but held that the amended statute satisfied the requirements of the Fourth Amendment (721 F.2d at 1075).

[4] The State appealed directly to the Supreme Court of Illinois pursuant to Ill. Sup. Ct. R. 603.

State—*Michigan* v. *DeFillippo*, 443 U.S. 31 (1979) —was inapposite because that case concerned an officer's reliance upon a substantive statute defining a criminal offense. The court stated that "an arrest and search made pursuant to a procedural statute, not yet declared unconstitutional, * * * which authorizes unlawful searches, will not be upheld, even though the arrest and search were made in good-faith reliance on the statute" (Pet. App. 20). The court observed that the statute at issue here "did not define a substantive criminal offense. Rather, it directly authorized warrantless searches" (*id.* at 21). The court therefore concluded that "[a]ny good-faith reliance on such a [procedural] statute will not cure an otherwise illegal search" (*ibid.*).[5]

SUMMARY OF ARGUMENT

The search of the automobile wrecking yard at issue in this case was authorized by a state statute that comprehensively regulated such businesses. This Court repeatedly has recognized that an administrative search of a regulated business is permissible under the Fourth Amendment without a warrant and without a showing of probable cause, as long as the statute authorizing the search satisfies certain requirements. The Illinois Supreme Court found that the statute authorizing the search at issue in this case did not comply with these requirements (Pet. App. 12-16), and petitioner has not sought review of that determination. The sole question in this case, therefore, is whether the exclusionary rule should be applied to suppress the probative evidence that was discovered in the search of the automobile wrecking yard.

[5] The court also rejected the State's contention that respondent Lucas had consented to the search (Pet. App. 22-24).

We submit that this Court's decision in *United States* v. *Leon*, 468 U.S. 897 (1984), compels the conclusion that the application of the exclusionary rule is wholly inappropriate when a law enforcement officer conducting an administrative search acts with the objectively reasonable, although erroneous, belief that the statute authorizing the search satisfied the requirements of the Fourth Amendment. Since the officer who conducted the search in this case reasonably believed that the Illinois statute complied with the relevant constitutional standard, the evidence obtained as a result of that search should not be suppressed.

A. The weighing of the costs and benefits of applying the exclusionary rule leads to the same conclusion in this case as in the case of the warrant-authorized searches that were at issue in *Leon*. The purpose of the exclusionary rule is to deter police misconduct. Yet the exclusionary rule will not have that deterrent effect if the police reasonably believe that their conduct is lawful—either because it is authorized by a presumptively valid warrant or because it is authorized by a presumptively valid statute. Nor is the exclusionary rule likely to have any significant effect in deterring legislators from enacting unconstitutional statutes. Legislators are not concerned with the outcome of particular criminal prosecutions, so it is highly unlikely that their legislative actions will be affected by the application of the exclusionary rule in a particular case. Moreover, because the exclusionary sanction in any event will apply in cases that arise after a statute has been held unconstitutional, the marginal effect upon legislators of requiring suppression in a case like this one will be minimal. Beyond that, parties who are aggrieved by an allegedly unconstitutional statute can often

obtain relief by challenging the statute in a civil action; the exclusionary rule is therefore not the only available remedy for deterring Fourth Amendment violations in the statutory context.

The costs of the exclusionary rule are at least as great in the case of searches authorized by a statute as they are in the case of searches authorized by a warrant. The principal cost, of course, is the loss of probative evidence from the truth-seeking process and the associated reduction in public confidence in the criminal justice system. In addition, however, there are special costs associated with the use of the exclusionary rule in connection with statutorily-authorized searches. Where a legislature has devised particular law enforcement techniques to help combat crime, the unduly broad application of the exclusionary rule can discourage cautious officers from using the investigative techniques authorized by the legislature for fear that a good faith error on their part will result in the suppression of important evidence. In that way, the purpose of the legislature in devising innovative law enforcement techniques may well be thwarted by the uncertainty that results from the threat of imposing the exclusionary sanction, even though an officer's conduct is objectively reasonable.

B. In this case, the officer's reliance on the constitutionality of the Illinois statute was clearly reasonable. If the statute was unconstitutional, it was only barely so; the flaw in the statute was at worst a technical one. The statute certainly was not so patently unconstitutional that the officer should have recognized its flaws and refused to exercise the authority conferred by the legislature.

Moreover, the officer's conduct in executing the search was entirely reasonable. His actions were consistent with the terms of the Illinois statute after it was amended to answer the constitutional objections that were raised shortly after the search in this case. Therefore, to apply the exclusionary rule in this case would be particularly pointless. It would provide respondents with the windfall of suppression, even though the alleged constitutional error did not result in a search that was any more intrusive than the search could have been if the legislature had enacted the more precise version of the statute in the first place.

ARGUMENT

THE EVIDENCE DISCOVERED AS A RESULT OF THE STATUTORILY-AUTHORIZED ADMINISTRATIVE SEARCH IN THIS CASE SHOULD NOT BE SUPPRESSED

A. The Exclusionary Rule Should Not Be Applied When A Law Enforcement Officer Conducts A Search In Reasonable Reliance Upon The Statute Authorizing The Search

1. It is by now well settled that the Constitution does not require that the exclusionary rule be applied in every case in which law enforcement officers fail to comply with the Fourth Amendment. Thus, "[t]he Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands, and an examination of its origin and purposes makes clear that the use of fruits of a past unlawful search or seizure 'work[s] no new Fourth Amendment wrong.'" *United States* v. *Leon*, 468 U.S. 897, 906 (1984), quoting *United States* v. *Calandra*, 414 U.S. 338, 354 (1974). Instead, the exclusionary rule is "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *United States* v. *Calandra*, 414 U.S. at 348 (footnote omitted); see also *Leon*, 468 U.S. at 906; *Stone* v. *Powell*, 428 U.S. 465, 486 (1976).

In addition, "[a]s with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *United States* v. *Calandra*, 414 U.S. at 348; see also *Leon*, 468 U.S. at 908 ("[c]lose attention to [the rule's] remedial objectives has characterized [the Court's] recent decisions concerning the scope of the Fourth Amendment exclusionary rule"). The propriety of applying the exclusionary rule in a particular situation turns upon "weighing the costs and benefits" of withholding from the truth-seeking process reliable evidence obtained in violation of the Fourth Amendment. *Leon*, 468 U.S. at 907; see also *id.* at 908-913 (cataloging circumstances in which the Court has found suppression of evidence unwarranted because the possible benefits of suppression did not outweigh the costs of applying the exclusionary rule); *United States* v. *Janis*, 428 U.S. 433, 454 (1976); *United States* v. *Calandra*, 414 U.S. at 351-352.

This Court held in *Leon* that because "the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion," the exclusionary rule should not be applied when an officer reasonably relies upon a search warrant issued by a magistrate (468 U.S. at 922). The balance of the relevant factors in the present context plainly shows that suppression is similarly unjustified. As we demonstrate below, the societal costs of applying the exclusionary rule when an officer conducts a search in reasonable reliance upon a subsequently invalidated statute far outweigh the highly unlikely possibility that suppression of the evidence will result in the deterrence of official misconduct.

2. The distinction between this case and *Leon* is that in *Leon* the search was authorized by a warrant issued by a magistrate, while in this case the search was authorized by a statute enacted by a legislature. That distinction does not support a difference in result or even a significant difference in analysis. As the Court stated in *Leon*, the purpose of the exclusionary rule is to "deter police misconduct" (468 U.S. at 916).[6] The rule is not designed to punish magistrates for issuing improper warrants or legislators for erroneously enacting unconstitutional statutes. The effect upon legislators of exclusion therefore is simply not relevant in assessing the efficacy of the rule. Yet even if the proper purposes of the exclusionary rule included deterring legislators from enacting unconstitutional statutes, the suppression of evidence obtained in reasonable reliance upon a statute would not be likely to have any such deterrent effect.

First, this Court's observation that "there exists no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment" (*Leon*, 468 U.S. at 916) applies with equal force to legislators.[7] There is no indication that

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[6] The benefit thought to be derived from the exclusionary rule is that the suppression of probative evidence will deter Fourth Amendment violations by removing any incentive that law enforcement agents might have to engage in such unlawful conduct. *Leon*, 468 U.S. at 906, 909-913. As this Court has observed, "[t]he rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins* v. *United States*, 364 U.S. 206, 217 (1960); see also *Michigan* v. *Tucker*, 417 U.S. 433, 447 (1974).

[7] The oaths taken by members of Congress and state legislators must include a commitment to support the federal Constitution (U.S. Const. Art. VI, Cl. 3).

either Congress or the state legislatures have enacted any significant number of statutes permitting searches violative of the Fourth Amendment. Legislatures generally have confined their efforts to authorizing searches of specific categories of businesses, and the resulting statutes typically have been held to be constitutional. See, *e.g.*, *Donovan* v. *Dewey*, 452 U.S. 594 (1981); *United States* v. *Biswell*, 406 U.S. 311 (1972); *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72 (1970); *United States* v. *Jamieson-McKames Pharmaceuticals, Inc.*, 651 F.2d 532 (8th Cir. 1981), cert. denied, 455 U.S. 1016 (1982); *United States* v. *Raub*, 637 F.2d 1205 (9th Cir.), cert. denied, 449 U.S. 922 (1980); 3 W. LaFave, *Search and Seizure* § 10.2, at 132-134 n.89.1 (Supp. 1986) (collecting cases).[8] There has been no showing of the kind of compelling need to discourage state and federal legislators from enacting unconstitutional statutes that would be required to justify the "extreme sanction of exclusion" (*Leon*, 468 U.S. at 916).

Second, and more important, the application of the exclusionary rule is unlikely to have any significant deterrent effect upon the actions of Congress or a state legislature. Legislators enact statutes for general, programmatic purposes, not to permit particular conduct in connection with a particular criminal investigation. Their goal is to enact a statute that

[8] Just as a magistrate sometimes may err in deciding to issue a warrant, legislatures have sometimes enacted statutes that do not comply with the Fourth Amendment. See, *e.g.*, *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978); *Berger* v. *New York*, 388 U.S. 41 (1967). However, these lapses do not indicate that legislators are attempting to subvert the Fourth Amendment. The enactment of these statutes more likely reflects legislators' good faith, but erroneous, assessment of the relevant Fourth Amendment standards.

will be held constitutional; the admissibility of evidence in the particular case in which the constitutional issue will be decided is wholly irrelevant to that goal. For that reason, legislators are far more likely to be influenced by the courts' substantive Fourth Amendment rulings regarding the validity of statutes than by the courts' application of the exclusionary rule in particular cases.

The question whether the exclusionary rule should be applied in cases such as this one—where the search was conducted before an adjudication of the statute's constitutionality—is likely to affect only a small number of prosecutions. That is because after a statute is declared unconstitutional, evidence obtained pursuant to that statute would be subject to suppression on the ground that a police officer's reliance on the constitutionality of the statute would no longer be objectively reasonable. The applicability of the exclusionary rule in the present setting therefore will be of far less concern to legislators than the underlying Fourth Amendment ruling, which will determine the overall validity of the statutory scheme and will affect the admissibility of evidence in all cases subsequent to the first definitive constitutional ruling. As a result, it is highly unlikely that the application of the exclusionary rule in this context would have any effect upon the legislators' actions.

A third reason that the exclusionary rule is not a necessary or appropriate method of deterring legislatures from enacting unconstitutional statutes is that statutes often can be challenged in other, more effective ways. In many circumstances, persons subject to searches pursuant to an allegedly unconstitutional statute can bring a pre-enforcement action seeking a declaration that the statute is unconstitutional and an injunction barring law enforcement

officers from conducting searches pursuant to the statute. Indeed, this course of action was followed with respect to the very statute that is at issue in this case. See *Bionic Auto Parts & Sales, Inc.* v. *Fahner*, 518 F. Supp. 582 (N.D. Ill. 1981), vacated on other grounds, 721 F.2d 1072 (7th Cir. 1983).[9] The availability of this form of relief, which generally cannot be used to challenge the validity of individual warrant-authorized searches, makes the case for using the exclusionary rule as a remedy even less compelling here than in cases involving searches based upon a warrant.

Finally, there is no need to use the exclusionary rule to deter legislatures from enacting unconstitutional statutes, because under the principles set forth in *Leon*, evidence obtained pursuant to clearly unconstitutional statutes is already subject to suppression. If a legislature enacts a statute that is flagrantly unconstitutional, it is likely that law enforcement officers' reliance on that statute—even before the statute is struck down by a court—would be found to be objectively unreasonable. In that setting, the analysis set forth in *Leon* would require the suppression of the evidence seized under the authority of the statute. While *Leon* teaches that the exclusionary rule "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity" (468 U.S. at 919), police conduct that is "flagrantly abusive of Fourth Amendment rights" is the kind of conduct that is most likely to be influenced by

[9] Similar pre-enforcement actions have been brought to challenge other statutes authorizing administrative searches. See, *e.g.*, *Rush* v. *Obledo*, 756 F.2d 713 (9th Cir. 1985); *In re Surface Mining Regulation Litigation*, 456 F. Supp. 1301 (D.D.C. 1978), aff'd in part and rev'd in part, 627 F.2d 1346 (D.C. Cir. 1980).

the sanction of exclusion. *Brown* v. *Illinois*, 422 U.S. 590, 610-611 (1975) (Powell, J., concurring); see also *Leon*, 468 U.S. at 923; *Michigan* v. *Tucker*, 417 U.S. 433, 447 (1974) ("[t]he deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct"). Accordingly, the rule for which we contend would not leave searches conducted pursuant to a statute altogether immune from the exclusionary rule, even before the statute was challenged in court. It would simply confine the exclusionary rule to the cases of flagrantly unconstitutional statutes, where the rule could reasonably be expected to have a useful deterrent effect.

In the more typical case involving a statute that is not obviously unconstitutional, the threat of the exclusion of evidence in a particular case will not deter either the legislature or the police. If a well-trained officer reasonably believes that a proposed search is constitutional, the threat of exclusion will not deter the officer from conducting the search, because the officer would have no reason to believe that any evidence discovered in the search was in danger of being suppressed. Application of the exclusionary rule thus cannot deter unconstitutional conduct when the officer reasonably believes that his conduct is constitutional. As the Court stated in *Leon*, "[W]here the officer's conduct is objectively reasonable, 'excluding the evidence will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that . . . the officer is acting as a reasonable officer would and should act in similar circumstances. Excluding the evidence can in no way affect his future conduct unless it is to make him less willing to do his duty.'" 468 U.S. at 919-920 (citation omitted); see also *Brown* v. *Illinois*, 422 U.S. at 611-612 (Powell, J., concurring); *Michigan* v. *Tucker*,

417 U.S. at 447 ("[w]here the official action was pursued in complete good faith * * * the deterrence rationale loses much of its force"). Thus, suppressing evidence obtained as the result of an officer's reasonable reliance upon a statute authorizing him to conduct a search will not have the deterrent effect that is the only benefit to be derived from the exclusionary rule.

In *United States* v. *Peltier*, 422 U.S. 531 (1975), the Court reached precisely the same conclusion in a closely analogous context. The Court had held in *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973), that warrantless nonborder searches conducted without probable cause violated the Fourth Amendment, even though the searches were conducted pursuant to a statute authorizing such searches "within a reasonable distance" of the border. *Almeida-Sanchez* was decided four months after the search at issue in *Peltier*; the question in *Peltier* was whether *Almeida-Sanchez* shcuild be applied retroactively to require the suppression of evidence obtained as a result of that search.

The Court noted that the Border Patrol agents who conducted the search in *Peltier* acted "in reliance upon a validly enacted statute, supported by longstanding administrative regulations and continuous judicial approval [in] stopp[ing] and search-[ing] [the defendant's] automobile" (422 U.S. at 541). Observing that deterrence is the sole justification for the exclusionary rule, the Court stated that "evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment" (*id.* at 542). Since the agents who conducted the search in

Peltier could not be charged with such knowledge, the Court concluded that "nothing in the Fourth Amendment, or in the exclusionary rule fashioned to implement it, requires that the evidence * * * be suppressed" (*ibid.*).

The analysis in *Peltier* applies with equal force in this case. As in *Peltier*, the application of the exclusionary rule when an officer acts in reasonable reliance upon a statute simply will not afford the deterrence that the rule is designed to provide.[10]

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[10] The approach to the retroactivity issue taken by the Court in *United States* v. *Johnson*, 457 U.S. 537 (1982), does not undercut this analysis. The question in *Johnson* was whether to accord retroactive effect to the decision in *Payton* v. *New York*, 445 U.S. 573 (1980), which prohibited a warrantless nonconsensual entry into a suspect's home to effect a routine arrest. In holding that *Payton* applied retroactively, the Court was concerned with ensuring the fair treatment of persons who were in the same situation as the defendant in *Payton*. If the decision had not been accorded retroactive effect, the defendant in *Payton* would have obtained the benefit of the rule announced in that case, while others whose cases were pending on review at the time would have been denied that benefit. See 457 U.S. at 554-556.

The Court in *Johnson* did reject the government's argument that *Peltier* indicated that only decisions addressing settled Fourth Amendment issues should be applied retroactively. It stated that "[f]ailure to accord *any* retroactive effect to Fourth Amendment rulings would 'encourage police or other courts to disregard the plain purport of our decisions and to adopt a let's-wait-until-it's-decided approach' " (457 U.S. at 561 (citation omitted; emphasis in original)). However, this statement does not preclude the adoption of the reasonableness exception to the exclusionary rule for which we contend in the present case. That exception would not enable an officer to disregard the "plain purport" of a decision of this Court; if the only reasonable interpretation of this Court's decision was that the officer's conduct was unconstitutional, the officer would not be able to show that he reasonably believed that his conduct was constitutional. In that setting,

3. Even if the application of the exclusionary rule in this context could have some marginal deterrent effect, that effect would be insufficient to outweigh the rule's "substantial social costs." *Leon*, 468 U.S. 909; see also *Illinois* v. *Gates*, 462 U.S. 213, 257-258 (1983) (White, J., concurring) ("any rule of evidence that denies the jury access to clearly probative and reliable evidence must bear a heavy burden of justification, and must be carefully limited to the circumstances in which it will pay its way by deterring official lawlessness"); *United States* v. *Janis*, 428 U.S. at 454 (in the absence of "appreciable deterrence," application of the exclusionary rule is not appropriate); *Alderman* v. *United States*, 394 U.S. 165, 174-175 (1969).

This Court has repeatedly recognized the exclusionary rule's "heavy costs to rational enforcement of the criminal law." *Stone* v. *Powell*, 428 U.S. at 500 (Burger, C.J., concurring); see also *Leon*, 468 U.S. at 907 ("[t]he substantial social costs exacted by the exclusionary rule * * * have long been a source of concern"). The rule excludes from consideration at trial evidence that is both relevant and trustworthy, thereby subverting the truthfinding function of both judge and jury. *Stone* v. *Powell*, 428 U.S. at 489-490; *United States* v. *Janis*, 428 U.S. at 448-449.

Moreover, as the Court observed in *Leon* (468 U.S. at 907-908 (footnote omitted)):

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applying the exclusionary rule would be appropriate. Thus, the Court's conclusion in *Leon* that "nothing in *Johnson* precludes adoption of a good-faith exception tailored to situations in which the police have reasonably relied on a warrant issued by a detached and neutral magistrate but later found to be defective" (468 U.S. at 912 n.9) also applies with respect to the reasonableness exception at issue in this case.

> An objectionable collateral consequence of this interference with the criminal justice system's truth-finding function is that some guilty defendants may go free or receive reduced sentences as a result of favorable plea bargains. Particularly when law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system.

Such results may well "generat[e] disrespect for the law and administration of justice" (*Stone* v. *Powell*, 428 U.S. at 491).

An additional cost is imposed upon society when evidence is excluded even though the officer who obtained the evidence reasonably believed that he was acting in conformity with the requirements of the Fourth Amendment. To the extent that the exclusionary rule will have any deterrent effect at all in that situation, it is likely to have a chilling effect upon legitimate police activities. Since the police officer's reasonable belief in the constitutionality of his actions could not ensure the admissibility of evidence obtained pursuant to a search, a cautious officer might be unwilling to engage in any but the most well-settled, traditional law enforcement activities in order to avoid the possibility of suppression. Such excessive caution might well lead an officer to forgo certain investigative conduct, even though that conduct would be entirely consistent with the Fourth Amendment. As Justice White has observed, "[t]o the extent the rule operates to discourage police from reasonable and proper investigative actions, it hinders the solution and even the prevention of crime." *Illinois* v. *Gates*, 462 U.S. at 258 (concurring opinion); see also *Leon*, 468 U.S. at 919-920.

This chill upon permissible law enforcement activities is a matter of special concern in the present context because if the exclusionary rule is applied to cases such as this one, law enforcement officers may be deterred from using investigative powers that were specifically granted by the legislature, even though those powers fully comply with the Fourth Amendment. To apply the exclusionary rule in that manner would thwart the will of the legislature by discouraging law enforcement officers from making use of authority set forth in a valid statute. Instead of deterring unconstitutional law enforcement activity, exclusion might well deter constitutional conduct specifically authorized by the legislature, with the result that unlawful activity will go undetected, or more efficient law enforcement techniques designed by the legislature for use in combatting crime will go unused. The costs associated with applying the exclusionary rule in cases involving presumptively constitutional statutes are therefore potentially even greater than the costs of excluding evidence obtained pursuant to a presumptively valid warrant.

4. In refusing to recognize an exception to the exclusionary rule in this case, the Illinois Supreme Court relied in large part upon this Court's decision in *Michigan* v. *DeFillippo*, 443 U.S. 31 (1979). The Illinois court concluded that *DeFillippo* requires the suppression of evidence whenever the evidence is obtained pursuant to a search that is authorized by a statute subsequently found to be unconstitutional. We submit that the Illinois court erred in concluding that the substantive Fourth Amendment rule set forth in *DeFillippo* controls the entirely different question presented in this case regarding the proper scope of the exclusionary rule.

The defendant in *DeFillippo* was arrested for violating a local ordinance that required any person

stopped by the police to identify himself and to produce evidence of his identity. A search incident to the arrest disclosed that the defendant was in possession of illegal drugs. The defendant was tried on a drug charge; prior to trial he sought to suppress the evidence obtained in the search incident to the arrest on the ground that the local ordinance that was the basis for the arrest was unconstitutional.

This Court held that the search did not violate the Fourth Amendment because it was incident to a valid arrest. The appropriate test for evaluating the validity of the arrest, the Court stated, was whether the officer had " 'probable cause' to justify an arrest" (443 U.S. at 37). The Court stated that the unconstitutionality of the ordinance did not preclude the arresting officer from possessing probable cause because "[a] prudent officer, in the course of determining whether [the defendant] had committed an offense under all the circumstances shown by this record, should not have been required to anticipate that a court would later hold the ordinance unconstitutional" (*id.* at 37-38). Since "the conduct observed violated a presumptively valid ordinance" (*id.* at 37), the officer "had probable cause to believe [the defendant] was committing an offense in his presence" (*id.* at 40).

The Court distinguished the local ordinance involved in *DeFillippo* from "statutes which, by their own terms, authorized searches under circumstances which did not satisfy the traditional warrant and probable-cause requirements of the Fourth Amendment" (443 U.S. at 39). Observing that several of its previous decisions had invalidated searches conducted in reliance upon procedural statutes of this type, the Court stated, "[w]e have held that the exclusionary rule required suppression of evidence

obtained in searches carried out pursuant to statutes, not previously declared unconstitutional, which purported to authorize the searches in question without probable cause and without a valid warrant" (*ibid.*).

Although it is true that the decisions cited by the Court directed the suppression of evidence, those decisions addressed substantive Fourth Amendment rules, not the issue of when the exclusionary rule should be applied. The statement in *DeFillippo* concerning statutes that authorize searches violative of the Fourth Amendment therefore must have been intended to make clear that searches conducted pursuant to such statutes *do* violate the Fourth Amendment, in contrast to the arrest in *DeFillippo*, which the Court specifically found did *not* violate the Fourth Amendment (443 U.S. at 39-40). The Court in *Leon* specifically acknowledged this fact by citing both *DeFillippo* and the cases identified in *DeFillippo* and stating that "[t]he *substantive Fourth Amendment principles* announced in those cases are fully consistent with our holding here" (468 U.S. at 912 n.8 (emphasis added)).

The determination whether the exclusionary rule should apply to remedy a particular Fourth Amendment violation is, of course, a question that is entirely separate from whether a Fourth Amendment violation exists in the first place. Because the *DeFillippo* decision did not address the availability of the reasonable mistake exception to the exclusionary rule for evidence obtained in searches authorized by statute, the language from *DeFillippo* on which the Illinois Supreme Court relied does not foreclose the recognition of such an exception in this case. See *Illinois* v. *Gates*, 462 U.S. at 256 n.12 (White, J., concurring) (observing that "[t]he results in these cases may well be different under a

'good-faith' exception to the exclusionary rule"). To the contrary, for the reasons we have discussed, this Court's precedents concerning the exclusionary rule strongly support the recognition of such an exception, because the costs of withholding probative evidence from the truth-seeking process far outweigh any benefits that could be obtained by applying the exclusionary rule in this setting.

B. The Law Enforcement Officer Who Conducted The Search In This Case Could Reasonably Believe That The Statute Authorizing The Search Complied With The Fourth Amendment

This Court has several times upheld the constitutionality of statutes authorizing warrantless administrative inspections. See *Donovan* v. *Dewey*, 452 U.S. 594 (1981); *United States* v. *Biswell*, 406 U.S. 311 (1972); *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72 (1970). The Court has explained that warrantless inspections are permissible in such cases because the authorizing statute serves as "a valid substitute for a warrant." *Donovan* v. *Dewey*, 452 U.S. at 603.

In order to serve that function, the statute authorizing the search must satisfy three prerequisites. First, the statute must be directed at a specific industry that is pervasively regulated. That requirement ensures that the administrative inspection scheme will not invade legitimate expectations of privacy with regard to business records and premises. See *Donovan* v. *Dewey*, 452 U.S. at 600; *United States* v. *Biswell*, 406 U.S. at 316-317.

Second, there must be a compelling public interest in performing inspections without a warrant. See *Donovan* v. *Dewey*, 452 U.S. at 600-602; *United States* v. *Biswell*, 406 U.S. at 315-317; *Camara* v. *Municipal Court*, 387 U.S. 523, 538 (1967); *See* v.

City of Seattle, 387 U.S. 541 (1967). The requirement that the legislation be directed at industries in which there is an objectively discernible public need for warrantless inspections serves as a substitute for the Fourth Amendment's requirement that a neutral party determine that there is a sufficient justification for issuing the warrant.

Third, the statute must restrict the discretion of the agents who conduct the inspections. See *Donovan* v. *Dewey*, 452 U.S. at 599, 601; *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 323 (1978). That requirement serves some of the same functions as the "particularity" requirement of the Fourth Amendment applicable to warrant-authorized searches.

The statute at issue in this case clearly satisfied at least two of these requirements. First, as the Seventh Circuit noted in upholding the constitutionality of the amended statute, the Illinois statute is directed at a pervasively regulated industry—the automotive parts industry—which the State of Illinois has for many years supervised through a system of licensing and inspection (*Bionic Auto Parts & Sales, Inc.* v. *Fahner*, 721 F.2d at 1079). Second, as both the Seventh Circuit and the Illinois Supreme Court acknowledged, the Illinois statute was designed to serve the strong public interest in preventing the theft of automobiles and trafficking in stolen automotive parts (Pet. App. 15; 721 F.2d at 1077-1078). Those courts also found that the legislature acted reasonably in concluding that warrantless administrative inspections were necessary to the effectiveness of the inspection system (Pet. App. 15-16; 721 F.2d at 1078).

The defect in the statute found by the Illinois Supreme Court related to the third requirement for a valid administrative inspection statute. The court

concluded that the statute vested the law enforcement officials with "too much discretion to decide who, when, and how long to search" (Pet. App. 16; see also *Bionic Auto Parts & Sales, Inc.* v. *Fahner*, 518 F. Supp. at 585-586).

Regardless of the correctness of that determination, we submit that it is beyond dispute that Detective McNally reasonably could have believed that the search he conducted pursuant to the statute was valid under the Fourth Amendment. Two separate theories support the reasonableness of his conduct.

1. The question of the constitutionality of the statute is a close one, and the court's objection to the statute is quite technical. Unlike the statutes discussed in this Court's decision in *Marshall* v. *Barlow's, Inc.*, *supra*, and *See* v. *City of Seattle*, *supra*, the Illinois statute was directed at a single, pervasively regulated industry in which the public interest clearly justified warrantless inspections. On the basis of those factors alone, this Court's decisions in *Colonnade Catering Corp.* v. *United States*, *supra*, and *United States* v. *Biswell*, *supra*, provide substantial support for the constitutionality of the Illinois statute. See also *Donovan* v. *Dewey*, 452 U.S. at 601 (distinguishing *Marshall* v. *Barlow's, Inc.*, *supra*, on the ground that the administrative search provisions in that case were not tailored to the "numerous and varied businesses regulated by the statute").

To be sure, the Illinois statute did not contain detailed provisions regulating the timing of inspections. The statute, however, required the inspections to be performed at "reasonable" times, and it contained restrictions on the nature and purpose of the inspections. It also limited the scope of the inspections to (1) the records that the businesses were required to maintain, and (2) the business premises,

but only to the extent necessary to determine the accuracy of the required records. Ill. Ann. Stat. ch. 95½, § 5-401(e) (Smith-Hurd Supp. 1984-1985). While the restrictions on the inspectors' discretion were not as detailed as those in the statute upheld by this Court in *Donovan* v. *Dewey*, *supra*, they were more elaborate than those found to be inadequate in *Marshall* v. *Barlow's, Inc.*, *supra*.

One measure of how close the original Illinois statute came to satisfying constitutional requirements is the fact that the Seventh Circuit upheld the amended version of the statute, even though the amendments made only minor changes in the original statutory scheme. See *Bionic Auto Parts & Sales, Inc.* v. *Fahner*, 721 F.2d 1072 (7th Cir. 1983). The principal changes in the amended statute were: (1) to provide that the inspections would take place during work hours; (2) to provide that each inspection would not last more than 24 hours; (3) to permit a representative of the licensee to be present during an inspection; and (4) to ensure that no more than six inspections of one business location would be conducted within any six-month period. See Ill. Ann. Stat. ch. 95½, § 5-403 (Smith-Hurd Supp. 1986). Those changes were plainly directed at extreme cases of abuse of the regulatory process. The original statute, which permitted inspections to occur only at a reasonable time and to include the examination of the premises only to the extent necessary to determine the accuracy of the required records, could well have been construed to require inspectors to conduct themselves according to standards at least as restrictive as those that ultimately were embodied in the amended statute.

Because the question of the constitutionality of the Illinois statute was a close one, and because the

defect in the statute, if any, was technical and could have been cured by judicial construction, it would be particularly inappropriate to apply the exclusionary rule in this case. The unconstitutionality of the statute was not so clear that law enforcement officers could not "reasonably presume it to be valid." *United States* v. *Leon*, 468 U.S. at 923. Instead, it would have taken a most extraordinary police officer to appreciate the constitutional arguments for and against the Illinois statute and to conclude that the statute was unconstitutional, albeit just barely so.

Moreover, at the time of Detective McNally's entry into respondent's wrecking yard there had been no court decision invalidating the Illinois statute or even suggesting that the statute was constitutionally infirm. In fact, the Indiana Supreme Court had recently upheld the constitutionality of a similar statute permitting warrantless searches in the motor vehicle industry. *State* v. *Tindell*, 272 Ind. 479, 399 N.E.2d 746 (1980). In light of the then-recent decision in *Donovan* v. *Dewey*, *supra*, even the federal district court that subsequently struck down the Illinois statute suggested that the constitutional question was a difficult one (see *Bionic Auto Parts & Sales, Inc.* v. *Fahner*, 518 F.Supp. at 584, 586). Under those circumstances, Detective McNally could not reasonably have been expected to entertain doubts about the validity of the statute and to decline to exercise the statutory inspection authority.

2. A related reason for not applying the exclusionary rule in this case is that Detective McNally did not conduct his inspection in an unreasonable manner. In fact, Detective McNally's inspection was conducted in a fashion that apparently would have satisfied all of the requirements of the amended Illinois statute that was upheld by the Seventh Circuit.

The inspection was conducted during business hours (9/25/81 Tr. 25); it was apparently of short duration, and it certainly did not approach the 24-hour limit imposed by the amended statute (*id.* at 8-9, 11, 16); and there is no suggestion in the record that the inspection was part of a pattern of harassment of respondents' business by repeated, unjustified inspections within a short period of time.

In addition, Detective McNally was specifically assigned to inspect automobile wrecking yards (9/25/81 Tr. 12), and he performed his inspection not on a whim, but only after he saw several vehicles being towed into respondents' premises (*id.* at 25). Beyond that, the inspection was limited to the required records of vehicle transactions and the yard where the vehicles were kept (Pet. App. 5-7).[11]

---

[11] Respondents contend (Br. in Opp. 18) that Detective McNally's inspection of the yard where the vehicles were stored was broader than the statute permits. Both the original and amended statutes, however, permitted the inspecting agent to examine the premises of the licensee's place of business "for the purpose of determining the accuracy of required records." Ill. Ann. Stat. ch. 95½, § 5-401(e) (Smith-Hurd Supp. 1984-1985). Respondent Lucas showed Detective McNally a record of the automobiles he had purchased for the business, which was the only version of the business's records that Lucas was able to produce (9/25/81 Tr. 26). Checking the automobiles in the yard was the only way Detective McNally could determine the accuracy and completeness of that record. In any event, the Illinois Supreme Court did not address the question whether Detective McNally exceeded the limits of his statutory authority when he ventured from the office into the wrecking yard and examined the vehicles that were stored there. That question, and the consequences that would flow from any such violation, are matters regarding the construction of the state statute that the Illinois courts can address on remand.

Thus, the constitutional complaint in this case was not with the conduct of the inspecting officer, but with the language of the authorizing statute. If the officer had conducted precisely the same inspection under the amended statute, the inspection would have been lawful.

To apply the exclusionary rule under these conditions would be especially inappropriate, since there was nothing about Detective McNally's conduct that should have been deterred. His conduct was entirely reasonable, and the search that he conducted would have been entirely permissible if it had been authorized by a better-drafted statute. It would extend the exclusionary rule far beyond any legitimate bounds to suppress evidence in a case such as this one, in which the officer behaved reasonably and the subject of the search was not prejudiced by the asserted constitutional error. Compare *United States* v. *Burke*, 517 F.2d 377, 386 (2d Cir. 1975) (suppression of evidence inappropriate where violation of Fed. R. Crim. P. 41 resulted in search by an unauthorized officer, but did not result in a violation of Fourth Amendment, and did not result in a more abrasive search than would have occurred absent the violation); *United States* v. *Harrington*, 681 F.2d 612, 615 (9th Cir. 1982), cert. denied, No. 84-1016 (Apr. 15, 1985) (lack of authority of officer conducting a search does not require suppression if other officers could have conducted same search); *United States* v. *Pennington*, 635 F.2d 1387, 1390 (10th Cir. 1980), cert. denied, 451 U.S. 938 (1981); *United States* v. *Dudek*, 530 F.2d 684, 688-689 (6th Cir. 1976); see generally *United States* v. *Donovan*, 429 U.S. 413, 432-439 (1977).

CONCLUSION

The judgment of the Supreme Court of Illinois should be reversed.

Respectfully submitted.

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85-608

No. 608

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF ILLINOIS,

Petitioner,

v.

ALBERT KRULL, GEORGE LUCAS and SALVATORE MUCERINO,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

MOTION TO JOIN BRIEF AND BRIEF AMICI CURIAE OF THE STATE OF ARIZONA, AND AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC. JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., AND THE ILLINOIS ASSOCIATION OF CHIEFS OF POLICE, INC., IN SUPPORT OF THE PETITIONER

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STATEMENT OF THE STATE OF ARIZONA

The State of Arizona appears as *amicus curiae* pursuant to Rule 36, Par. 4, which brief is sponsored by the Hon. Robert K. Corbin, Attorney General for the State of Arizona.

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MOTION FOR LEAVE OF NON-STATE AMICI CURIAE TO FILE BRIEF

Come now **Americans for Effective Law Enforcement, Inc.,** *et al.,* and move this Court for leave to file and join the attached brief as *amici curiae,* and declare as follows:

1. *Identity and Interest of Amici Curiae.* The non-state *amici curiae* are described as follows:

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* seventy-one times in the Supreme Court of the United States, and thirty-six times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio and Missouri.

The International Association of Chiefs of Police, Inc. (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 12,600 members in 62 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

The National District Attorneys Association, Inc. (NDAA) is a nonprofit corporation and the sole national organization representing state and local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publication, and *amicus curiae* activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all of our citizens.

The Illinois Association of Chiefs of Police, Inc. (IACP-IL), is a not-for-profit Illinois association and consists of over 800 members who are Illinois police chiefs and senior law enforcement executives. It, too, seeks to represent in our courts the concern of the average citizen with the problems of crime and police effectiveness in dealing with crime, with special

emphasis upon the problems and concerns of police officers who face numerous legal and practical problems on a day-by-day basis in their effort to protect public safety.

2. *Desirability of an Amici Curiae Brief.* *Amici* are professional associations representing the interests of law enforcement agencies at the state and local levels. Our members include: (1) law enforcement officers and law enforcement administrators who are charged with the responsibility of obtaining and executing arrest and search warrants, making warrantless arrests and searches, as well as carrying out the regulatory statutes of various states, and (2) prosecutors, county counsel and police legal advisors who, in their criminal jurisdiction capacity, are called upon to advise law enforcement officers and administrators in connection with such matters, and to prosecute cases involving evidence obtained thereby.

Because of the relationship with our members, and the composition of our membership and directors—including active law enforcement administrators and counsel—we possess direct knowledge of the impact of the ruling of the court below, and we wish to impart that knowledge to this Court. We respectfully ask this Court to consider this information in reaching its decision in this case.

3. *Reasons for Believing that Existing Briefs May Not Present All Issues.* AELE, IACP, and NDAA are national associations, and their perspective is nationwide. IACP-IL represents law enforcement officers and law enforcement administrators in the State of Illinois who are directly effected by the decision of the court below. This brief concentrates on policy issues, including the values served by the State's ability to adopt statutes giving effect to the good faith exception to the exclusionary rule, especially as such statutes pertain to arrests and searches based upon statutes that are constitutional on their face. Although Petitioner is clearly represented by capable and diligent counsel, no single party can completely develop all relevant views of such issues as these.

4. *Avoidance of Duplication.* Counsel for *amici curiae* has reviewed the Petition for Certiorari and has conferred with counsel for Petitioner in an effort to avoid unnecessary duplication. It is believed that this brief presents several issues that are not otherwise raised.

5. *Consent of Parties or Requests Therefor.* Counsel has requested consent of all parties. The Consent of Petitioner has been received, and the consent has been filed with the clerk of this Court. This Motion is necessary because counsel for Respondents have declined to grant consent to the *amici.*

For these reasons, the non-State *amici curiae* request that they be granted leave to file and join in the attached *amici curiae* brief.

Respectfully submitted,

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INTEREST OF AMICI CURIAE

THE ATTORNEY GENERAL OF THE STATE OF ARIZONA is the chief law enforcement officer of his state.

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ARGUMENT

A SEARCH THAT IS CONDUCTED PURSUANT TO A STATUTORY SCHEME LATER HELD UNCONSTITUTIONAL IS NEVERTHELESS VALID IF IT IS UNDERTAKEN IN GOOD FAITH RELIANCE ON THAT STATUTE PRIOR TO THE TIME THAT ANY COURT HAS DECLARED THE STATUTE UNCONSTITUTIONAL; SUCH RULING IS NECESSARY TO GIVE EFFECT TO THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE ADOPTED BY THIS COURT, AND AS CODIFIED BY THE STATES.

The Court below, *People v. Krull,* 107 Ill. 2d 107, 481 N.E.2d 703 (1985), ruled, *inter alia,* that: (1) a state statute which, prior to its amendment by other statutes, authorized warrantless administrative searches of records and business premises of automotive parts dealers, scrap processors, and parts recyclers "at any reasonable time during the night or day" was unconstitutional, and (2) a search made in good faith reliance on the unconstitutional statute which at the time of the search had not yet been declared unconstitutional was not valid.

Amici curiae will not duplicate the case law analysis presented by the Petitioner State of Illinois in this case, although we agree with that analysis. Instead, we will concentrate upon issues of policy.

We note, however, that the issues involved in this case could readily have been resolved by the court below by a straightforward application of this Court's decision in *Michigan v. DeFillippo,* 443 U.S. 31, 99 S.Ct. 2627 (1979). In that case this Court ruled that evidence seized by the police incident to an arrest pursuant to an ordinance subsequently declared to be unconstitutional was nevertheless admissible because of the good faith reliance of the officer upon the presumptively valid ordinance. In the instant case, the Illinois law enforcement officers acted pursuant to a statute that, at the time of the

search, was valid on its face and had not been declared unconstitutional. The attempt of the court below, 481 N.E.2d at 708, to distinguish between substantive laws, as opposed to procedural laws, for application of the rule in *DeFillippo* is unwarranted in light of the *rationale* for the rule in *DeFillippo, i.e.,* that suppression of evidence obtained by a law enforcement officer pursuant to a law valid on its face would serve no *deterrent purpose.* As the Court had previously stated in *Michigan v. Tucker,* 417 U.S. 433, 94 S.Ct. 2357 (1974), "[W]here the official action was pursued in complete good faith ... the deterrence rationale [of the exclusionary rule] loses much of its force." 417 U.S. at 447, 94 S.Ct. at 2365.

Viewed from the basis of the primary purpose of the exclusionary rule—deterrence—and the rationale applied by this Court in *DeFillippo* and *Tucker,* the distinction made by the Illinois court is fundamentally flawed.

This conclusion is especially true in light of this Court's subsequent decision in *United States v. Leon,* 468 U.S. ____, 104 S.Ct. 3405 (1984); and, in fact, adoption of the distinction made by the Illinois court in the instant case would be a substantial *regression* from *Leon.* In that case this Court adopted the rule that the exclusionary rule should not be applied when a police officer conducting a search has acted in a good-faith, objectively reasonable reliance on a warrant issued by a detached and neutral magistrate that is subsequently determined to be invalid. The underlying basis for the Court's rule, as noted by various commentators subsequent to *Leon, e.g.,* LaFave, 1 Search and Seizure (1978), 1986 Pocket Part 1; Inbau, Thompson, Zagel and Manak, Criminal Law and Its Administration (1984), 1986 Supplement 169-170, was that suppression of evidence where the officer has acted in objective good faith would not serve the *primary purpose* of the exclusionary rule—*deterrence.*

Amici submit that the same rationale should apply in this case. Although the search was without a warrant, it was pursuant to the authority of a state statute valid on its face. The statute placed affirmative duties upon the law enforcement officers to conduct an inspection of a state-regulated industry. No deterrent value could possibly result from suppression of the evidence in this case; and, in fact, if the officers in *Krull* were required to make an arrest or search at any time in the future pursuant to an Illinois statute valid on its face and not then declared unconstitutional by a court of competent jurisdiction, we would, as law enforcement administrators, *expect* them to do so and might question their *failure to do so.* Their failure to do so could well be a dereliction of duty; a subsequent judicial determination that the statute was unconstitutional—whether it were a substantive or procedural statute—would have *no* deterrent effect upon the officers' conduct and *should not* have a deterrent effect upon the duty of the officers to enforce the law.

The lack of deterrent effect is even stronger in the case of a statute pertaining to a "pervasively regulated industry" such as that involved in the instant case—auto salvage yards that are potential *loci* of criminal activity—where the state interest in inspection of books, records and facilities is strong. See *People v. Barnes,* ____ Mich. App. ____, 379 N.W.2d 464 (1986) (a state statute requiring individuals in the "pervasively regulated industry" of automobile salvage yards to keep records and inventory open to police inspection without a warrant during business hours did not violate the Fourth Amendment).

Amici would go further and assure this Court that as law enforcement administrators and professional associations representing law enforcement administrators, it would be our responsibility—as expressed in carrying out training, supervisory, and disciplinary functions where applicable—that police officers are to follow the requirements of state statutes valid on their face, and that their failure to do so could, in appropriate cases, be a basis for disciplinary action. Under these circum-

stances—which is simply a reiteration of the traditional supervisory role and function of law enforcement administration—it would be highly unlikely that a subsequent judicial invalidation of a statute or ordinance could *ever* have a deterrent effect upon police behavior.

There is yet another reason why this Court should reject the rationale applied by the court below and reverse this case. This Court's decision in *Leon*, and the companion case of *Massachusetts v. Sheppard*, 468 U.S. ____, 104 S.Ct. 3424 (1984), was the culmination of the realization by this Court as expressed in earlier cases such as *United States v. Peltier*, 422 U.S. 531, 95 S.Ct. 2313 (1975), that the *underlying rationale* of the exclusionary rule (as a rule of evidence not constitutionally mandated) is *deterrence* of police violations of Fourth Amendment rights. Without specific or general deterrent value in a particular judicial application of the rule, the rule serves no purpose save to punish the police and provide the defendant with a windfall.

This underlying rationale for the rule has also been recognized by various policy-making bodies. The 1981 Attorney General's Task Force on Violent Crime recommended in its Final Report, 55: ". . . evidence should not be excluded from a criminal proceeding if it has been obtained by an officer acting in the reasonable, good faith belief that it was in conformity to the Fourth Amendment." State legislation enacted prior to *Leon-Sheppard* by the States of Arizona and Colorado provided that evidence was not to be suppressed if it "was seized by a peace officer as a result of a good faith mistake or technical violation," the latter including "a reasonable good faith reliance upon . . . [a] statute which is subsequently ruled unconstitutional." Ariz. Rev. Stat. § 13-3925; Colo. Rev. Stat. § 16-3-308 to the same effect (in *People v. Deitchman*, 695 P.2d 1146 (1985) four members of the Supreme Court of Colorado reached the conclusion that the good faith exception of the Colorado statute did not apply to the case). National professional organizations of law enforcement officers and administrators have made similar recommendations, *e.g.*, AELE Model State Statute on Exclusionary Rule Limitation (1985). Moreover, similar legislation has been introduced at the federal level, *e.g.*, S. 2231, 97th Cong., 2d Sess. (1982); Exclusionary Rule Application Act of 1982, proposed in Title II of S. 2903, 97th Cong., 2d Sess. (1982); The Exclusionary Rule Bills: Hearings Before the Sub-comm. on Criminal Law of the Senate Comm. on the Judiciary, 97th Cong., 1st and 2d Sess. (1982). And similar legislation is pending in various state legislatures, including Illinois (Ill. H.B. 3077: "... 'Good Faith' means whenever a peace officer obtains evidence; ... pursuant to a warrantless search incident to an arrest for violation of a statute or local ordinance which is later declared unconstitutional or otherwise invalidated.")

These various enactments, bills, proposals and recommendations, are founded on the proposition approved by this Court in *Leon-Sheppard, i.e.*, that *deterrence* is the underlying rationale for application of the exclusionary rule; and several of them recognize that good faith should, in part, be based upon police conduct taken pursuant to a statute or ordinance later deciared unconstitutional by a court.

Affirmance of the decision of the court below would not only have the effect of regressing from the underlying rationale of *Leon-Sheppard* but would, in effect, negate the legislative judgment of Arizona and Colorado that good faith should be based in part upon a police officer's reliance upon a statute or ordinance valid on its face. Such a decision would also have the effect of retarding the process at state and federal levels of codifying the good faith exception to the exclusionary rule, *which process is desirable for the guidance of police, prosecutors, and courts.*

Amici respectfully submit that reversal of the decision below is the only action that this Court can take consistent with the rule of *Leon-Sheppard;* reversal will additionally speed the process of codification of the good faith exception, providing law enforcement officials and courts with clear and precise *guidance* for cases where continued application of the exclusionary rule *is* deemed appropriate.

CONCLUSION

Amici respectfully request this Court to affirm the rationale of its decisions in *Leon-Sheppard* by declaring that the fruits of a search conducted by a police officer pursuant to a statute later declared unconstitutional are admissible in a criminal prosecution. We urge that the decision of the court below should be reversed on the basis of law and sound judicial policy.

Respectfully submitted,

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